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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBIN L. AVERY,

Petitioner,

v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation; FIRST RESOLUTION INVESTMENT CORPORATION, an unregistered entity; DERRICK E. McGAVIC, Attorney; KRISTIN K. FINNEY, Attorney,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 14, 2009

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QUESTIONS PRESENTED

Should the term "state" in a New Hampshire tolling statute, made applicable to a civil action in Oregon through a choice of law provision in a credit card agreement, be construed to mean the state of New Hampshire, as the choice of law state, or the State of Oregon, as the forum state, to determine whether a New Hampshire statute of limitations has been tolled as a result of a consumer "residing out of the state"?

Does a tolling statute in a consumer transaction that, as applied, is unconstitutional under the Commerce Clause invalidate a statute of limitations more beneficial to the consumer under a choice of law provision in a credit card agreement?

Does a mistake about the law concerning the applicable statute of limitations qualify as a *bona fide* error to relieve a debt collector from liability under 15 U.S.C. § 1692k(b) of the Fair Debt Collection Practices Act (FDCPA)?

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PETITION FOR A WRIT OF CERTIORARI

Robin L. Avery ("Avery") petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, dated May 22, 2009, is reported at 568 F.3d 1018 and is reproduced at Appendix A, 1a-13a.

The Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 4, 2009 is reported at 561 F.3d 998 and is reproduced at Appendix B, 14a-23a.

The judgment of the United States District Court for the District of Oregon dated August 7, 2007 is reproduced at Appendix C, 24a-25a.

The Opinion and Order of the United States District Court for the District of Oregon dated May 25, 2007 is unofficially reported at 2007 U.S. Dist. LEXIS 39260 and is reproduced at Appendix D, 26a-45a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on April 2, 2009.

Avery filed a petition for rehearing *en banc*. Four nonprofit entities petitioned to file an *amicus brief* in

support of the petition for rehearing *en banc* which was allowed in an order entered May 15, 2009.

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on May 22, 2009 which included an order denying the petition for rehearing *en banc*.

This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of entry of the Amended Opinion which included the order denying the petition for rehearing *en banc*.

This Court has jurisdiction to review the United States Court of Appeals for the Ninth Circuit decisions on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

FAIR DEBT COLLECTION PRACTICES ACT, 15 U.S.C. §§ 1692(e) & 1692k

§ 1692(e) Purposes

> It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ... (2) The false representation of – (A) the character, amount, or legal status of any debt; ...

§ 1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of– (1) any actual damage sustained by such person as a result of such failure; (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; ...

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors--

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and

the extent to which such noncompliance was intentional; ...

NEW HAMPSHIRE REVISED STATUTES ANNOTATED § 508:4 & § 508:9

R.S.A. §508:4

Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, ...

R.S.A. §508:9

If the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action.

OREGON REVISED STATUTES § 12.430, § 12.440 & § 12.450

§ 12.430 Claims based on law of other states; limitation period.

(1) Except as provided by ORS 12.450, if a claim is substantively based:

(a) Upon the law of one other state, the limitation period of that state applies; or

(b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies.

(2) The limitation period of this state applies to all other claims.

§ 12.440 Application of statutes and rules governing conflict of laws.

If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.

§ 12.450 When limitation period of another state not applicable.

If the court determines that the limitation period of another state applicable under ORS 12.430 and 12.440 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim, the limitation period of this state applies.

STATEMENT OF THE CASE

Avery, an Oregon resident at all relevant times, received an offer for a credit card from Providian National Bank ("Providian") in July of 2001. Avery

applied for and received a credit card and a cardholder agreement from Providían.

Providían established a credit card account for the credit card. Avery used the credit card to make several purchases, received billing statements at her residence in Oregon and made several payments on the account balance from Oregon. Under the terms of the cardholder agreement, Avery was charged interest at 23.99% per annum on the unpaid balance.

The last payment was credited to the credit card account on November 5, 2001. At that time, the balance was shown as $2,971.82. The payment due on December 16, 2001 was not made nor was any payment made after that date.

Providían assigned the account for collection and, after intermediate assignments, transfers and sales, First Resolution Investment Corporation ("First Resolution") purchased the debt. First Resolution sent Avery a collection notice dated November 15, 2004, identifying itself as the owner of the debt and telling Avery that the debt would be forwarded to a lawyer in her area if the debt was not resolved by December 6, 2004.

Avery received a letter dated December 29, 2004, from Derrick McGavic ("McGavic"), an attorney, with the information required under 15 U.S.C. §§ 1692g(a) and e(11). There was no additional activity until February 9, 2006, when McGavic filed a civil action against Avery, on behalf of First Resolution, in the Washington County Circuit Court of the State of Oregon ("civil action"). Avery was served with a summons and complaint on the same day.

On the day she was served, Avery disputed the debt in writing and requested verification pursuant to the notice provided under 15 U.S.C. §§ 1692g(a).

Kristen K. Finney ("Finney"), an attorney working for McGavic, responded to Avery's request for verification in May of 2006 and provided updates on the amount of the balance due in June and August of the same year.

On September 13, 2006, McGavic served Avery with a notice of intent to apply for an order of default judgment which is a prerequisite to taking a default judgment in a civil action when a plaintiff receives notice from the defendant of an intent to defend in a civil action. Oregon Rules of Civil Procedure No. 69.

On September 20, 2006, Finney received notice that Avery was represented by an attorney and would pursue a statute of limitations defense. The next day, Finney filed a voluntary motion to dismiss the civil action without prejudice. McGavic and Finney (collectively, "the Attorneys") denied that they dismissed the civil action because of a statute of limitations defense and alleged that they did so because they concluded it would be best to avoid protracted litigation over such a small amount.

On December 19, 2006, Avery filed suit in the United States District Court for the District of Oregon alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*, ("FDCPA") for filing a legal action to collect a time-barred debt. Avery sought to recover actual damages under 15 U.S.C. § 1692k(1) and additional damages of $1,000 under 15 U.S.C. § 1692k(2)(A) on the grounds that First Resolution and

the Attorneys violated 15 U.S.C. § 1692e and § 1692e(2) of the FDCPA by filing the legal action.

The choice of law provision stated that New Hampshire law applied no matter where Avery resided. The claim presented was based upon the debt being time-barred under a New Hampshire three-year statute of limitations made applicable under the choice of law provision in the cardholder agreement.

On January 31, 2007, First Resolution filed a counterclaim seeking to collect the debt. Avery moved to dismiss the counterclaim under Federal Rule of Civil Procedure 12(b)(1) on the grounds that the claim was time-barred or, in the alternative, for lack of subject matter jurisdiction.

The Attorneys moved for summary judgment on the claim under the FDCPA on the grounds that the debt was not time-barred because Avery was never a resident of New Hampshire and the New Hampshire tolling statute precluded running of the New Hampshire statute of limitations in her favor.

Avery filed a cross-motion for summary judgment, arguing that the underlying debt at issue was time-barred and that filing the civil action to recover a time-barred debt violated 15 U.S.C. § 1692e as a matter of law.

In an Opinion and Order dated May 25, 2007 ("Opinion"), App. D, the District Court held that the three-year statute of limitations under New Hampshire law applied, the tolling provision under New Hampshire law precluded running of the statute of limitations because Avery was never a resident of

New Hampshire, the New Hampshire tolling statute was unfair to Avery as an out of state resident, the New Hampshire statute of limitations did not apply because the tolling statute was unfair and the six-year statute of limitations for breach of contract under Oregon law, ORS § 12.080, applied under which the claim was not time barred. The District Court also declined to exercise supplemental jurisdiction over counterclaim.

A judgment was entered on August 8, 2007, App. C, dismissing the FDCPA claims with prejudice and the counterclaim without prejudice.

Avery petitioned for attorney fees on the counterclaim which the District Court denied in an order entered on October 4, 2007.

Avery appealed to United States Court of Appeals for the Ninth Circuit.

In an Opinion filed on April 2, 2009, the Ninth Circuit Court of Appeals affirmed the Opinion and Order of the District Court. On April 24, 2009, Avery petitioned for rehearing *en banc*.

On May 4, 2009, four California based nonprofit corporations filed a motion for leave to file an *amicus brief* in support of rehearing *en banc* and, in the alternative, requesting a modification of the panel Opinion. An order granting the motion was filed on May 15, 2009.

An Amended Opinion was filed on May 22, 2009 with a footnote explaining that the Opinion did not mean to decide the ramifications of allowing perpetual

tolling against out-of-state debtors and concurrently denied the petition for rehearing *en banc*. The footnote limited the effect of the holding to Avery and the argument that the term "state" meant New Hampshire and not Oregon as the forum state.

The mandate of the United States Court of Appeals for the Ninth Circuit was entered of record on June 15, 2009.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE PRESENTED IS OF NATIONAL IMPORTANCE BECAUSE A SUBSTANTIAL NUMBER OF FINANCIALLY DISTRESSED CONSUMERS, CREDIT CARD COMPANIES AND DEBT COLLECTORS SUBJECT TO FDCPA LIABILITY ARE AFFECTED BY STATUTES OF LIMITATIONS IN CREDIT CARD AGREEMENTS.

Credit card companies base credit privileges on creditworthiness through provisions in adhesive cardholder agreements. The terms of agreement between credit card issuers and consumers are unilaterally set by the credit card issuers that, as in the present case, become effective on use.

Credit card issuers normally, as a term of contract, include a choice of law provision that conforms with the *situs* of the card issuer's business activity, state of incorporation and/or states whose laws are considered favorable to the credit card issuer.

The cardholder agreement provided by Providían included a choice of law provision that New Hampshire law applied which conforms with the location of its business.

The presumptive intent of credit card issuers adopting a choice of law provision is to limit liability of the credit card issuers and/or impose liability on consumers according to the preferences of the credit card issuer. When a credit card account that is in default approaches a statute of limitations, the debt is sold at a discount rate (normally for less than 10% of the outstanding balance). Debt purchasers then attempt to collect the debt which includes litigation by assignment to collection attorneys.

Debt purchasers pursue collection for the maximum available balance which normally exceeds the original balance as a result of the passage of time and predatory finance charges. Unsophisticated consumers, more often than not, permit default judgments to be entered without regard to available defenses. Due to high volume assignments, collection attorneys often file legal actions without consideration of the statute of limitations. Collection activity and judgments based upon the escalated balance owed prompt bankruptcies.

The Opinion of the District Court reforms the contractual relation between the consumer, Avery, and the card issuer, Providían, in favor of the debt purchaser, First Resolution, in relation to the applicable statute of limitations established as a term of contract.

The Opinion, as a precedent, revives stale debt in favor of debt purchasers, subjects financially distressed consumers to economic burden and promotes collection activity inconsistent with the enumerated purposes of the Fair Debt collection Practices Act, 15 U.S.C. 1692, *et seq* ("FDCPA"). Under the present national economy, the effect of that precedent adversely affects consumers, creditors and debt collectors whose assets are reduced through the promotion of bankruptcies from revival of stale debt.

II. THE OPINION IS IN ERROR AND CONFLICTS WITH OPINIONS OF THE UNITED STATES SUPREME COURT.

A. The Opinion is in Error

Statutes of limitations are found and approved in all systems of enlightened jurisprudence, *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). They represent a pervasive legislative judgment that the right to be free of stale claims over time prevails over the right to prosecute them, *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). The purpose of a statute of limitations is to bring an end to the uncertainties of litigation within a reasonable time.

The purpose of a tolling statute is to defeat acts of a debtor that interfere with a creditor's ability to enforce a claim. *Bauserman v. Blunt*, 147 U.S. 647, 657 (1892). A statute of limitations is not postponed under a tolling statute when a creditor fails to avail itself of all available means to prosecute or to preserve a claim. *Bancorp Leasing & Fin. v. Agusta Aviation*, 813 F.2d 272 (9th Cir. 1987), citing, *Bauserman* and *Whittington v. Davis*, 350 P.2d 913 (1960).

1. The Applicable Statute of Limitations under a Choice of Law Provision in a Contract Is Established According to the Law of the Forum State.

A district court follows the conflict-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941). The statute of limitations for a choice of law analysis is procedural or substantive according to the forum state. *Sun Oil Co. v. Worman*, 486 U.S. 717, 108 (1988).

Oregon adopted the *Uniform Conflict of Laws-limitations Act* which is codified at Oregon Revised Statutes §§ 12.410 to 12.480. Under ORS § 12.430, the applicable statute of limitations for a claim substantively based upon the law of another state is the limitation period of that state. The applicable statute of limitations under New Hampshire Revised Statutes Annotated, RSA § 508:4, is three years which was accepted in the proceedings below.

2. The Applicable Accrual and Tolling Statutes Are Established According to the Conflict of Law of the Forum State.

If the statute of limitations of another state applies to the assertion of a claim in Oregon, the relevant statutes and other rules of law of that state which govern tolling and accrual of statutes of limitations apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply. O.R.S. § 12.440.

3. For Tolling Statutes, Absence Is Construed to Mean Legal, Not Physical Absence

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), it was determined that New Hampshire exercises long arm jurisdiction which means that, even to the extent an action could ever have been filed in New Hampshire, Avery was, nevertheless, subject to service through long arm jurisdiction at all times.

Subsequent to *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), courts that have addressed the effect of tolling statutes construe absence or presence to mean legal and not physical presence. *Bancorp Leasing & Fin.*, at 274-275.

4. To the Extent a Tolling Statute Applies to Physical Presence, Conflict of Law Analysis under Oregon Law Compares a Tolling Statute with the Oregon Tolling Statute to Determine Whether Conflict Exists

In *Bendix Autolite Corp.*, Justice Scalia, in a concurring opinion, stated that a scale analogy is not appropriate when judging whether a particular line is longer than a particular rock is heavy. *Id*, at 897. The same principal applies to the present case where the Opinion invalidates a statute of limitations by holding a tolling statute to be unfair.

Oregon adopts the statute of limitations for the choice of law state. If the limitation period of another state applicable under ORS § 12.430 and § 12.440 is

determined to be substantially different from the limitation period of Oregon and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim, the limitation period of Oregon applies.

The express language of ORS § 12.440 evaluates the relevant statute of limitations for fairness, not the tolling statute, and provides a mechanism to evaluate and invalidate a statute of limitations through an unfairness analysis. No evidence was presented in the District Court to invalidate the three year statute of limitations.

In Oregon, the threshold requirement for conflicts of law analysis is that there be a conflict. In the absence of a conflict, there is no requirement for a conflict of law analysis. The New Hampshire tolling statute is R.S.A. §508:9. Oregon's counterpart to the New Hampshire tolling statute is ORS § 12.150. There is no substantial conflict of law between the Oregon and New Hampshire statutes, both using the term "state", that would invite *sua sponte* invalidation of the New Hampshire tolling statute made applicable under Oregon law.

To the extent there is a conflict, the analysis should compare the statutes of limitations with statutes of limitations and tolling statutes with tolling statutes which, in this case, would merely substitute ORS § 12.150 for R.S.A. §508:9, rather than invalidate a more beneficial statute of limitations through an analysis declaring a tolling statute to be unfair.

5. Providían and its Assignees Failed to Plead or Demonstrate Diligence in Pursuing its Judicial Remedies

Avery was at all times available for service of process in Oregon and was, in fact, sued and served in Oregon. Delay in pursuing a judicial remedy arose exclusively from the conduct of Providían and its assignees, including First Resolution and the Attorneys. The tolling argument was not pleaded in the civil action which is normally the responsibility of the party claiming its benefit.

B. The Opinion Conflicts with Precedent of this Court

1. The Function of the Court Is to Harmonize Laws to Enforce Rather than Create Conflicts That Invalidate Contracts.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this court considered principles of contract construction. Cardinal principles of contract construction include that ambiguous language is construed against the interest of the party that drafted it and a document should be read to give effect to all of its provisions to render them consistent with each other. *Mastrobuono*, at 62-64.

The Opinion of the District Court does the opposite by construing an adhesive cardholder agreement in favor of a debt purchaser, standing in the shoes of the original creditor, by invalidating application of a more beneficial New Hampshire statute of limitations based

upon a conflict of law analysis that, as construed, determines that a tolling statute is unfair or invalid.

A choice of law in a contract is a choice of the law, not geography. The common sense and more reasonable construction of the tolling statute is to construe and apply "state" to mean the forum state in which a consumer resides which in this case is Oregon.

2. Tolling Statutes That Require Physical Presence Are Repugnant to the Commerce Clause.

Bendix Autolite Corp. concerned a commercial transaction and held that a statute of limitations defense is not a fundamental right, but an integral part of the legal system that may not be withdrawn in relation to out-of-state persons or corporations when the withdrawal is repugnant to the Commerce Clause. *Id.*, at 893.

The tolling statute was held to be repugnant because it required physical rather than legal presence in Ohio which was otherwise available through Ohio's long-arm jurisdiction. *Id.*, at 894. *Keeton* upheld jurisdiction in New Hampshire under a minimum contacts analysis based upon availability of long-arm jurisdiction.

Although never addressed in the context of consumer debt, the principals articulated in *Bendix Autolite Corp.* should apply equally to consumer transactions.

III. THE ISSUE IS OF EXCEPTIONAL IMPORTANCE TO CONSUMERS SUBJECT TO JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. The Opinion Discriminates Against Consumers in Oregon and Sets an Adverse Precedence for All Consumers Subject to Jurisdiction of the United States Court of Appeals for the Ninth Circuit

1. The Opinion Revives Stale Debt for Oregon Consumers.

Consumers in Oregon who have defaulted on credit card debt subject to a three year statute of limitations under a choice of law are no longer subject to judicial remedies. The Opinion revives stale credit card debt for financially distressed Oregon consumers whose debt falls between the three year and six year period in which judicial remedies are otherwise not available.

2. The Opinion Sets an Adverse Precedent for Consumers Within the Jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Another state court applying the principles articulated in *Bendix Autolite Corp.* and *Abramson* applied the proper distinction when there was an actual conflict in a choice of law analysis. In *Financial Bancorp v. Pingree and Dahle*, 880 P.2d 14 (Utah Ct. App. 1994), the Utah court determined that a

California statute of limitations applied to a case brought in Utah and remanded the issue of whether or not the relevant California tolling statute applied. The same analysis should apply in this case. The Opinion of the District Court abrogates that holding by invalidating a statute of limitations based upon a tolling statute.

3. The Opinion Was Construed Adverse to Financially Distress Consumers and the Amended Opinion Did Not Cure The Adverse Holding

The ramifications of the holding were demonstrated in the interpretation of the Opinion of the appellate court by nonprofit organizations in California providing support to financially distressed consumers. The *amici* interpreted the Opinion according to its plain meaning and sought intervention to avoid its consequences. Their concerns were addressed by an amendment added as a footnote that the holding applies only to Avery which does not resolve the adverse precedent.

B. The Opinion Conflicts with Precedent of the United States Court of Appeals for the Ninth Circuit

Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990), concerned a contract between nonresident individuals in California. *Abramson* held that a statutory scheme that forces a nonresident individual engaged in interstate commerce to choose between being present in California or forfeiture of the limitations defense to be unconstitutional under the Commerce Clause. The Opinion of the District Court

is in conflict with the holding in *Abramson* which provides the correct legal principles for construing the constitutionality of a tolling statute.

C. Precedent Construing Tolling Statutes under Oregon Law by the United States Court of Appeals for the Ninth Circuit Is Inconsistent with the Opinion

In *Bancorp Leasing & Fin. v. Agusta Aviation*, 813 F.2d 272 (9th Cir. 1987), a tolling provision under Oregon law was analyzed. The issue concerned an Oregon statute of limitations and a tolling statute. The defendants argued that the statute of limitations was tolled because none of the defendants ever resided in Oregon. The Ninth Circuit held:

> Although no Oregon court has considered whether the tolling statute should apply when a foreign corporation is amenable to service under the long-arm statute, a majority of jurisdictions addressing this issue in similar circumstances have refused to apply tolling provisions. [extensive citations omitted]
>
> We believe that the Oregon Supreme Court would follow the majority rule. We conclude that the Oregon statute of limitations is not tolled when a foreign corporation could have been served under the long-arm statute.

Id., at 274-276.

The Opinion of the District Court is inconsistent with and controverts the more reasoned holding in *Bancorp* construing Oregon law.

IV. THE OPINION CONFLICTS WITH PRECEDENT IN OTHER UNITED STATES COURTS OF APPEAL

A. The Issue Is of Exceptional Importance to Consumers and Debt Collectors in the Present State and National Economies

The majority of credit card companies sell credit card debt at a discount rate near to the lapse of the choice of law period of limitations in anticipation of the debt becoming time barred. In this case, the last payment occurred on November 5, 2001 and default occurred on December 16, 2001. Providían, the original creditor, first sold the debt on July 30, 2004.

When credit card debt subject to predatory finance charges is sold, the effect is that debt buyers, debt collectors who have no interest in a continuing relation with the consumer, pursue collection after lapse of the choice of law statute of limitations and seek a balance substantially greater than the original debt based upon those predatory finance charges. In this case the default amount was $2,971.82 subject to a 23.99% annual percentage rate which resulted in a demand of $7,619.61 plus attorney fees and court costs.

Avery demanded verification based upon the statute of limitations for ten months and the Attorneys dismissed the underlying legal action as a result of a single telephone call from an attorney giving an inference that the legal action was knowingly filed and accepted as a time-barred debt. The Opinion of the District Court, through legal analysis, revived consumer debt that is otherwise unenforceable

through judicial remedies. Its precedential effect is to revive stale debt for all consumers in like circumstances, not just Avery. The only beneficiary is the debt purchaser and those who seek compensation through prohibited deceptive collection practices.

B. The Issue Is of Exceptional Importance to Consumers in Oregon

Oregon ranks high among states experiencing unemployment and its courts have expressly addressed tolling statutes. In *Whittington*, the Oregon Supreme Court articulated its policy related to misapplication of a tolling statute in a motor vehicle accident as follows:

> There is also a matter of policy involved in this case. If we would accede to plaintiff's argument it would mean that a plaintiff could indefinitely postpone the filing of an action against a nonresident motorist. He could await a propitious time when witnesses or parties were unavailable and thereby effectively deprive a defendant of any defense the defendant may have. The plaintiff's theory could well lead to the equivalent of fraud.
>
> Every trend of the law is, and must be, to expedite all litigation to the end that every cause and party receive prompt, full and judicious determination of all issues on the merits.

Id., at 916-917.

Oregon policy supports enforcement of choices of law in contracts and disfavors the holding in the Opinion of the District Court.

C. The Issue Is of Exceptional Importance to Consumers Subject to the Jurisdiction of the United States Court of Appeals for the Ninth Circuit

The importance of the issue and precedential intent of the holding was manifested in the panel decision:

> Although the analysis in this case is otherwise simple enough to be addressed in an unpublished opinion, we address this issue to hold that, under OR. REV. STAT. §§ 12.430 and 12.440, when parties lawfully adopt a state's law for the purposes of resolving disputes arising from an agreement, they adopt that state's statute of limitations provision and tolling provision *in toto*. App. A, at 8a, App. B, at 20a.

The foregoing accurately states the import and gravity of the precedential effect of the error on financially distressed consumers through revival of otherwise stale debt and the substantial benefit to third party debt collectors. The holding prompted four nonprofit corporations in California to file an *amici brief*. The accommodation provided in the Amended Opinion was application of the decision to Avery only in a footnote which fundamentally stated that the Opinion did not mean what it said and declined to address issues theretofore addressed in written and oral argument.

D. The Issue Is of Exceptional Importance to Consumers, Creditors and Debt Collectors in Other States

In *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D. Fla. 2008), a Florida district court evaluated comparable facts and argument in relation to a cardholder agreement with a Delaware choice of law in connection with a claim under the FDCPA. *McCorriston* cited a Delaware decision observing that blanket application of the same argument for Delaware's tolling statute involving non-resident defendants "would result in the abolition of the defense of statutes of limitation in actions involving non-residents." *Id.*, at 1276, *citing Hurwitch v. Adams,* 155 A.2d 591, 594 (Del. 1959). The opinion of the Florida district court is reproduced at Appendix E, 46a-67a.

E. The Opinion Conflicts with Decisions of Other United States Courts of Appeals

The proper construction of the tolling statute is to construe the word "state" to mean the forum state, in this case Oregon. However, to the extent a physical presence is required, the United States Courts of Appeal have uniformly invalidated tolling statutes that operate against an out of state resident. This includes the United States Court of Appeals for the Ninth Circuit, *supra*.

1. Third Circuit Court of Appeals

In *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686 (3rd Cir. 1990), the appellate court invalidated a New Jersey tolling statute under the Commerce Clause

because it required physical rather than legal presence for out-of-state defendants.

2. Fifth Circuit Court of Appeals

In *Cadles of Grassy Meadows v. Goldner*, 542 F.3d 437 (5th Cir. 2008), the appellate court sustained dismissal of a claim as time-barred notwithstanding a Texas tolling statute that the District Court held invalid under the Commerce Clause. The decision was subsequently withdrawn because the Supreme Court of Texas interpreted the tolling statute to mean that if a nonresident is amenable to service of process under a long-arm statute, he was present for purposes of the tolling statute. *Cadles of Grassy Meadows v. Goldner*, 549 F.3d 348 (5th Cir. 2008) *citing Kerlin v. Sauceda*, 263 S.W.3d 920 (Tex. 2008).

3. Eighth Circuit Court of Appeals

In *Bottineau Farmers Elev v. Woodward-Clyde*, 963 F.2d 1064 (8th Cir. 1992), the appellate court invalidated a North Dakota tolling statute holding that a state's interest in assisting its residents in litigating against non-resident defendants, when long-arm service of process is available, cannot justify the imposition of a greater burden on non-residents than residents.

In *Rademeyer v. Farris*, 284 F.3d 833 (8th Cir. 2002), the appellate court sustained a dismissal when Missouri construed a tolling statute to be precluded when a nonresident was subject to long-arm statute jurisdiction. The court noted that every court considering a tolling statute similar to the one in *Bendix Autolite Corp.* has struck down the statute as

unconstitutional under the Commerce Clause, whether the nonresident defendant be a corporation or an individual, and whether the statute is on its face discriminatory or neutral.

4. The Opinion of the District Court Is an Anomaly Whose Precedential Value Is Heightened Through the Opinion and Amended Opinion of the United States Court of Appeals for the Ninth Circuit

The Opinion of the District Court stands alone in the analysis presented and unfairly applies precedent to Avery and consumers in Oregon, *App. D.* The Amended Opinion and Opinion each state that the holding is to be given precedential effect adverse to consumers, *supra*.

V. THE ISSUE IS IMPORTANT TO APPLICATION OF THE FDCPA IN A TROUBLED NATIONAL ECONOMY

A. Seeking Amounts Not Owed Was Noted by the Federal Trade Commission as a Frequent Consumer Complaint in the Most Recent Report to Congress

The Federal Trade Commission (FTC) held that filing legal actions for time barred debt violates the FDCPA and, in its most recent report to Congress, reported that violations of 15 U.S.C. § 1692e(2) ranked second as the number of complaints among the category of violations in calendar year 2008. *Federal Trade Commission Enforcement of the Fair Debt Collection Practices Act: The Thirty-First Annual*

Report to Congress may be viewed at http://www.ftc.gov/reports/index.shtm.

B. The Most Recent Precedent Related to the FDCPA Was Decided in 1995.

In *Heintz v. Jenkins*, 514 U.S. 291 (1995), this Court, addressing the 1986 amendment removing an exemption for attorneys, held that the FDCPA is to be interpreted according to its plain meaning. Subsequent to *Heintz*, there has been substantial case law developed by the district courts and United States Courts of Appeal in the area of the prohibition against filing legal actions to collect time barred debt.

C. The *Bona Fide* Error Defense referenced in *Heintz* Lead to Variant Judicial Standards Between the United States Circuit Courts of Appeals Applicable to That Defense.

In *McCorriston*, a *bona fide* error defense relieved a debt collection attorney from liability for filing a time barred debt. The *McCorriston* court noted that there was a disparity between the circuits as to whether a mistake about the law is a *bona fide* error. The *McCorriston* court held that a mistake about the law qualified as a *bona fide* error noting that cases reaching a contrary conclusion are traceable to *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). *McCorriston*, at 1274 fn 4, App. E, at 56a.

The *bona fide* error defense was raised in the court below and Avery sought summary judgment pursuant to the judicial standard set forth in *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982) on the

grounds that a mistake about the law does not constitute a *bona fide* error.

There is a variance in the standards between the United States Courts of Appeal as to whether or not a mistake about the law in the context of litigation qualifies as a *bona fide* error.

D. There Is Nominal Variance Between the United States Court of Appeals in Applying the FDCPA for the Collection of Time Barred Debt.

The first opinion addressing the actionability of attempting to collect time-barred consumer debt by threatening to file and filing legal actions was *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala, 1987).

In the twenty years since *Kimber*, a number of district courts have favorably cited and/or distinguished the standards set forth in *Kimber* without compromising the fundamental premise that filing a legal action to collect time-barred consumer debt is prohibited by the FDCPA.

At least four appellate courts have cited and/or distinguished standards in *Kimber*. See, *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 332-334 (6th Cir. 2006), analyzing cases related to time-barred debts in other courts, *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 996 n.1 (7th Cir. 2003), citing *Kimber* for the proposition that an objective standard applies to claims under §1692f, *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767, 771 (8th Cir. 2001), holding that, in the absence of a threat of

litigation or actual litigation, there is no violation in attempting to collect a potentially time-barred debt that is otherwise valid, *Transamerica Financial Services v. Sykes*, 171 F.3d 553 (7th Cir. 1999), distinguishing *Kimber* on the grounds that the debt collector was vested with knowledge that the debt was time-barred, *Taylor v. Perrin, Landry, deLaunay & Dirano*, 103 F.3d 1232, 1239 (5th Cir. 1997), favorably citing *Kimber* in relation to a defendant's status as a debt collector.

Resolving the variance in applying *Kimber* standards combined with resolving the variance in standards between the United States Courts of Appeal as to whether or not a mistake about the law qualifies in the context of litigation as a *bona fide* error is an additional reason for review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35726
D.C. No. CV-06-01812-HA

[Filed May 22, 2009]

ROBIN L. AVERY,
Plaintiff-Appellant,

v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation; FIRST RESOLUTION INVESTMENT CORPORATION, an unregistered entity; DERRICK E. MCGAVIC, Attorney; KRISTIN K. FINNEY, Attorney,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
March 4, 2009—Portland, Oregon

Filed April 2, 2009
Amended May 22, 2009

Before: Susan P. Graber, Raymond C. Fisher and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Danny H. Gerlt, Portland, Oregon, for the plaintiff-appellant.

David A. Jacobs, Luvaas Cobb, Eugene, Oregon; Daniel N. Gordon P.C., Eugene, Oregon, for the defendants-appellees.

ORDER

The opinion filed April 2, 2009 is hereby amended to include the following footnote, placed at the end of the sentence <<Avery agreed to abide by New Hampshire's statute of limitations as well as its tolling provisions, which have consistently been interpreted by New Hampshire courts to apply when defendants are absent from New Hampshire, not from any other state.>>. *Avery v. First Resolution Mgmt.*, No. 07-35726, slip op. at 3978.

Text of the footnote:

<<Several advocacy groups filed a brief as amici curiae in support of Avery's petition for rehearing en banc, suggesting that our opinion overlooks the ramifications of allowing perpetual tolling against out-of-state debtors under New Hampshire's tolling

provision. We do not purport to construe definitively the scope of New Hampshire's tolling provision or to determine conclusively its effect when lawsuits are filed outside New Hampshire courts. Rather, we address only the narrow statutory argument Avery has made: that under Oregon's choice of law regime, "the state" referred to in N.H. REV. STAT. ANN. § 508:9 is Oregon when a lawsuit is filed in Oregon but New Hampshire law otherwise governs.

We express no opinion on arguments Avery did not raise, including, without limitation: (1) whether New Hampshire courts would construe N.H. REV. STAT. ANN. § 508:9 to allow perpetual tolling against an out-of-state defendant on a cause of action that could not, as a matter of law, be brought in New Hampshire courts, *see* 15 U.S.C. § 1692i (requiring debt collectors to bring action on debt against a consumer in the judicial district where the consumer signed a contract or where the consumer resides); or (2) whether a credit card agreement would be unconscionable under New Hampshire law if it led to perpetual tolling when the debt collector was free to sue the card holder at any time in the card holder's home jurisdiction.>>

The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. Petitions for rehearing and rehearing en banc concerning the amended opinion will not be permitted. *See* Gen. Order 5.3(a).

Accordingly, with the filing of this amendment, the petition for rehearing en banc is DENIED.

OPINION

MILAN D. SMITH, JR., Circuit Judge:

Plaintiff-Appellant Robin L. Avery appeals the district court's grant of summary judgment in favor of Defendants-Appellees Derrick E. McGavic and Kristin K. Finney (collectively, the Attorneys) and the district court's denial of Avery's request for attorney's fees from Defendants-Appellees First Resolution Management Corporation and First Resolution Investment Corporation (collectively, First Resolution). Avery claims that the Attorneys attempted to collect a time-barred debt against her in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. She also claims that the district court's refusal to accept supplemental jurisdiction over First Resolution's counterclaim against her entitles her to attorney's fees as a prevailing party. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Avery, an Oregon resident at all relevant times, received an offer for a credit card from Providian National Bank (Providian) in July 2001. Avery applied for and received the card and used it to make several purchases. She received the billing statements at her Oregon residence and made payments on her card balance, the last of which was credited to her account on November 5, 2001. At that time, Avery's balance stood at $2,971.82. Under the terms of the credit card agreement, Avery was charged interest at 23.99% per annum on any unpaid balance. The agreement also

provided that the laws of New Hampshire would apply in case of a dispute, regardless of Avery's actual residence, and contained an attorney's fee clause. Avery defaulted on her account and made no further payments after November 2001.

Providian assigned the account for collection, and First Resolution purchased the debt. On November 15, 2004, First Resolution sent Avery a notice identifying itself as the owner of the debt and indicating that the account information would be forwarded for collection to a lawyer in Avery's area if the debt was not resolved by December 6, 2004. Avery received a letter dated December 29, 2004, from McGavic, one of the Attorneys, informing her, as required by 15 U.S.C. § 1692(g) and (e)(11), that she could dispute her debt in writing and that First Resolution was considering filing suit. McGavic filed suit against Avery on behalf of First Resolution on February 9, 2006, in the Washington County Circuit Court of Oregon.

On the day the suit was filed, Avery disputed the debt and requested verification. Finney, the other of the Attorneys, responded to Avery's request for verification in May and provided Avery updates on the amount of the balance in June and August. On September 13, 2006, McGavic served Avery with a notice of intent to apply for an Order of Default Judgment. On September 20, Finney received notice that Avery was represented. The next day, Finney filed a motion to dismiss the underlying lawsuit without prejudice, allegedly because the Attorneys had concluded it would be best to avoid protracted litigation over such a small amount. The Attorneys denied that the reason they decided to dismiss the

lawsuit was because Avery indicated her intention to pursue a statute of limitations defense.

Avery filed suit against First Resolution and the Attorneys on December 19, 2006, in the United States District Court for the District of Oregon. On January 31, 2007, First Resolution filed a counterclaim seeking to collect the debt due on Avery's account. Avery moved to dismiss the claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Attorneys moved for summary judgment on Avery's FDCPA claim that they had illegally attempted to collect a time-barred debt, and Avery made a cross-motion for summary judgment, arguing that the underlying debt at issue was time-barred as a matter of law.

The district court found that the underlying debt was not time-barred and granted the Attorneys' motion for summary judgment, denying Avery's cross-motion for summary judgment on the same issue. The district court also declined to exercise supplemental jurisdiction over First Resolution's counterclaim and dismissed it accordingly, but did not award Avery attorney's fees. Avery appealed to this court.

STANDARD OF REVIEW

We review a district court's decision on cross-motions for summary judgment de novo. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Summary judgment is appropriately awarded when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the district court has correctly

applied the underlying substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

We review the district court's denial of attorney's fees and costs for abuse of discretion. *P.N. v. Seattle Sch. Dist., No. 1*, 474 F.3d 1165, 1168 (9th Cir. 2007). Elements of legal analysis and statutory interpretation underlying the district court's decision are reviewed de novo, and factual findings are reviewed for clear error. *Id.*

DISCUSSION

A. Summary Judgment to the Attorneys

[1] Both parties agree that under the terms of the original agreement between Avery and Providian National Bank, New Hampshire law applies to this dispute. Under Oregon law, applied by the district court sitting in diversity, if a claim is based upon the law of another state, the limitations period of that state applies, as do the laws of that state governing tolling and accrual. OR. REV. STAT. §§ 12.430(1)(a), 12.440. Accordingly, because New Hampshire law covers First Resolution's claim against Avery, New Hampshire law also controls the applicable statute of limitations, as well as tolling and accrual provisions.

[2] The New Hampshire statute of limitations for an action on a credit card is three years. N.H. REV. STAT. ANN. § 508:4. However, this statutory period is tolled if a defendant is absent from and residing out of the state at the time the cause of action accrued. *Id.* § 508:9 ("If the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of

such absence shall be excluded in computing the time limited for bringing the action."). Avery contends that "the state" referred to in the New Hampshire statute should be interpreted to mean "the forum state," in this case, Oregon, and not New Hampshire.

[3] All available case law interpreting this statute suggests that its intent and purpose is to toll New Hampshire's statute of limitations when the defendant is not available to be served by a plaintiff suing in the state of New Hampshire. *Bolduc v. Richards*, 142 A.2d 156, 158 (N.H. 1958) (holding that the statute of limitations is only tolled when a defendant could not otherwise be served in New Hampshire due to lack of personal jurisdiction); *Quarles v. Bickford*, 13 A. 642, 643 (N.H. (1887) (same); *see also Atwood v. Bursch*, 219 A.2d 285, 287 (N.H. 1966) (holding that the statute of limitations runs only in favor of those who are within the state).

[4] Although the analysis in this case is otherwise simple enough to be addressed in an unpublished opinion, we address this issue to hold that, under OR. REV. STAT. §§ 12.430 and 12.440, when parties lawfully adopt a state's law for the purposes of resolving disputes arising from an agreement, they adopt that state's statute of limitations provision and tolling provision *in toto*. Avery agreed to abide by New Hampshire's statute of limitations as well as its tolling provisions, which have consistently been interpreted by New Hampshire courts to apply when defendants

are absent from New Hampshire, not from any other state.[1]

Avery's theory rests on the premise that Oregon's choice of law regime converts the foreign jurisdiction's substantive law into Oregon's for the purposes of that lawsuit. That premise is not borne out by the plain language of the Oregon statutes. *See* OR. REV. STAT. § 12.440 (providing "the other state's statutes and other rules of law governing tolling and accrual apply"); OR. REV. STAT. § 81.120 (providing "the contractual rights and duties of the parties are

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[1] Several advocacy groups filed a brief as amici curiae in support of Avery's petition for rehearing en banc, suggesting that our opinion overlooks the ramifications of allowing perpetual tolling against out-of-state debtors under New Hampshire's tolling provision. We do not purport to construe definitively the scope of New Hampshire's tolling provision or to determine conclusively its effect when lawsuits are filed outside New Hampshire courts. Rather, we address only the narrow statutory argument Avery has made: that under Oregon's choice of law regime, "the state" referred to in N.H. REV. STAT. ANN. § 508:9 is Oregon when a lawsuit is filed in Oregon but New Hampshire law otherwise governs.

We express no opinion on arguments Avery did not raise, including, without limitation: (1) whether New Hampshire courts would construe N.H. REV. STAT. ANN. § 508:9 to allow perpetual tolling against an out-of-state defendant on a cause of action that could not, as a matter of law, be brought in New Hampshire courts, *see* 15 U.S.C. § 1692i (requiring debt collectors to bring action on debt against a consumer in the judicial district where the consumer signed a contract or where the consumer resides); or (2) whether a credit card agreement would be unconscionable under New Hampshire law if it led to perpetual tolling when the debt collector was free to sue the card holder at any time in the card holder's home jurisdiction.

governed by the law or laws that the parties have chosen"). Taken together, these provisions simply require Oregon courts to apply the substantive law of another jurisdiction *as a court of the foreign jurisdiction would*, not to transform that foreign substantive law into domestic law for a particular case. Avery's suggested gloss of New Hampshire's tolling statute in light of Oregon's conflict of law regime is wholly unwarranted; it seeks to take advantage of the portions of New Hampshire law that are favorable to Avery and ignore the balance.

Plaintiff contests the constitutionality of the New Hampshire tolling statute's application to her, citing *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), which in turn relied on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). We need not decide whether the New Hampshire tolling statute's application to Avery is unconstitutional because, even if it were, Oregon law provides that Oregon's limitation period applies if the limitation period of another state that otherwise would apply imposes an unfair burden in defending against the claim. OR. REV. STAT. § 12.450. The applicable Oregon statute of limitations for contractual claims is six years, *id.* § 12.080, and the action against Avery was filed within six years.

[5] Because Avery was absent from New Hampshire at all relevant times, the statute of limitations on the claim against her was tolled under New Hampshire law and had not run by the time the Attorneys brought suit against her in Oregon. Even if the New Hampshire tolling statute were unconstitutional, OR. REV. STAT. § 12.450 would replace New Hampshire's statute of limitations with

Oregon's six-year limitations period, under which the suit was timely. Accordingly, the district court did not err in granting summary judgment to the Attorneys on the claim that they had violated the FDCPA by attempting to collect on a time-barred debt. The district court was also correct in denying Avery's claim for summary judgment on this issue.[2]

B. Attorney's Fees

In an action where a federal district court exercises subject matter jurisdiction over a state law claim, so long as state law does not contradict a valid federal statute, " 'state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' " *MRO Commc'ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975)); *see also Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Under Oregon choice-of-law provisions, the state law chosen by the parties to control the substantive issue under dispute also controls the issue of attorney's fees, unless doing so would circumvent a fundamental public policy of Oregon law. *Fiedler v. Bowler*, 843 P.2d 961, 963 (Or. Ct. App. 1992). In this case, however, the district court explicitly declined to exercise subject matter jurisdiction over the state law claim, so it is unclear whether New Hampshire law or federal law controls Avery's entitlement to attorney's fees on the state law

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[2] Because the claim against Avery was not time-barred, we need not and do not decide whether the FDCPA prohibits efforts to collect a time-barred debt.

counterclaim. *See MRO Commc'ns*, 197 F.3d at 1281 (holding state law controls entitlement to attorney's fees *if* the district court exercises subject matter jurisdiction over a state law claim).

[6] We need not resolve this question, because Avery has not established her entitlement to attorney's fees under either standard. Although the New Hampshire Supreme Court has held a party is entitled to attorney's fees under New Hampshire law when the opposing party recovers nothing on a claim after a jury trial, *see Van Der Stok v. Van Voorhees*, 866 A.2d 972, 978 (N.H. 2005), we have not found any case in which a New Hampshire court held a party is entitled to attorney's fees when a claim against it is dismissed without prejudice. Under federal law, a prevailing party must have experienced an alteration in the legal relationship of the parties in order to be entitled to attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Avery's legal relationship with First Resolution was not altered by the district court's dismissal without prejudice of the permissive state law counterclaims because First Resolution was free to refile those claims. *See Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 982 (9th Cir. 2008) (holding defendant was not a prevailing party, because defendant "remains at risk that Oscar will re-file his IDEA claim in federal court"); *cf. Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 103 (2d Cir. 2006) (per curiam) (denying the defendant's claim for attorney's fees because "[a] dismissal on the ground of *forum non conveniens* does not, after all, immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims"). Accordingly, the district court did

not abuse its discretion in denying Avery's motion for attorney's fees and costs.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35726
D.C. No. CV-06-01812-HA

[Filed April 2, 2009]

ROBIN L. AVERY,
Plaintiff-Appellant,

v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation; FIRST RESOLUTION INVESTMENT CORPORATION, an unregistered entity; DERRICK E. MCGAVIC, Attorney; KRISTIN K. FINNEY, Attorney,
Defendants-Appellees.

Appeal from the United States District Court
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Argued and Submitted
March 4, 2009—Portland, Oregon

Filed April 2, 2009

Before: Susan P. Graber, Raymond C. Fisher and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Danny H. Gerlt, Portland, Oregon, for the plaintiff-appellant.

David A. Jacobs, Luvaas Cobb, Eugene, Oregon; Daniel N. Gordon P.C., Eugene, Oregon, for the defendants-appellees.

OPINION

MILAN D. SMITH, JR., Circuit Judge:

Plaintiff-Appellant Robin L. Avery appeals the district court's grant of summary judgment in favor of Defendants-Appellees Derrick E. McGavic and Kristin K. Finney (collectively, the Attorneys) and the district court's denial of Avery's request for attorney's fees from Defendants-Appellees First Resolution Management Corporation and First Resolution Investment Corporation (collectively, First Resolution). Avery claims that the Attorneys attempted to collect a time-barred debt against her in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. She also claims that the district court's refusal to accept supplemental jurisdiction over First Resolution's counterclaim against her entitles her to attorney's fees as a prevailing party. We have

jurisdiction under 28 U.S.C. § 1291, and we affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Avery, an Oregon resident at all relevant times, received an offer for a credit card from Providian National Bank (Providian) in July 2001. Avery applied for and received the card and used it to make several purchases. She received the billing statements at her Oregon residence and made payments on her card balance, the last of which was credited to her account on November 5, 2001. At that time, Avery's balance stood at $2,971.82. Under the terms of the credit card agreement, Avery was charged interest at 23.99% per annum on any unpaid balance. The agreement also provided that the laws of New Hampshire would apply in case of a dispute, regardless of Avery's actual residence, and contained an attorney's fee clause. Avery defaulted on her account and made no further payments after November 2001.

Providian assigned the account for collection, and First Resolution purchased the debt. On November 15, 2004, First Resolution sent Avery a notice identifying itself as the owner of the debt and indicating that the account information would be forwarded for collection to a lawyer in Avery's area if the debt was not resolved by December 6, 2004. Avery received a letter dated December 29, 2004, from McGavic, one of the Attorneys, informing her, as required by 15 U.S.C. § 1692(g) and (e)(11), that she could dispute her debt in writing and that First Resolution was considering filing suit. McGavic filed suit against Avery on behalf

of First Resolution on February 9, 2006, in the Washington County Circuit Court of Oregon.

On the day the suit was filed, Avery disputed the debt and requested verification. Finney, the other of the Attorneys, responded to Avery's request for verification in May and provided Avery updates on the amount of the balance in June and August. On September 13, 2006, McGavic served Avery with a notice of intent to apply for an Order of Default Judgment. On September 20, Finney received notice that Avery was represented. The next day, Finney filed a motion to dismiss the underlying lawsuit without prejudice, allegedly because the Attorneys had concluded it would be best to avoid protracted litigation over such a small amount. The Attorneys denied that the reason they decided to dismiss the lawsuit was because Avery indicated her intention to pursue a statute of limitations defense.

Avery filed suit against First Resolution and the Attorneys on December 19, 2006, in the United States District Court for the District of Oregon. On January 31, 2007, First Resolution filed a counterclaim seeking to collect the debt due on Avery's account. Avery moved to dismiss the claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Attorneys moved for summary judgment on Avery's FDCPA claim that they had illegally attempted to collect a time-barred debt, and Avery made a cross-motion for summary judgment, arguing that the underlying debt at issue was time-barred as a matter of law.

The district court found that the underlying debt was not time-barred and granted the Attorneys'

motion for summary judgment, denying Avery's cross-motion for summary judgment on the same issue. The district court also declined to exercise supplemental jurisdiction over First Resolution's counterclaim and dismissed it accordingly, but did not award Avery attorney's fees. Avery appealed to this court.

STANDARD OF REVIEW

We review a district court's decision on cross-motions for summary judgment de novo. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Summary judgment is appropriately awarded when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the district court has correctly applied the underlying substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

We review the district court's denial of attorney's fees and costs for abuse of discretion. *P.N. v. Seattle Sch. Dist., No. 1*, 474 F.3d 1165, 1168 (9th Cir. 2007). Elements of legal analysis and statutory interpretation underlying the district court's decision are reviewed de novo, and factual findings are reviewed for clear error. *Id.*

DISCUSSION

A. Summary Judgment to the Attorneys

[1] Both parties agree that under the terms of the original agreement between Avery and Providian National Bank, New Hampshire law applies to this dispute. Under Oregon law, applied by the district court sitting in diversity, if a claim is based upon the

law of another state, the limitations period of that state applies, as do the laws of that state governing tolling and accrual. OR. REV. STAT. §§ 12.430(1)(a), 12.440. Accordingly, because New Hampshire law covers First Resolution's claim against Avery, New Hampshire law also controls the applicable statute of limitations, as well as tolling and accrual provisions.

[2] The New Hampshire statute of limitations for an action on a credit card is three years. N.H. REV. STAT. ANN. § 508:4. However, this statutory period is tolled if a defendant is absent from and residing out of the state at the time the cause of action accrued. *Id.* § 508:9 ("If the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action."). Avery contends that "the state" referred to in the New Hampshire statute should be interpreted to mean "the forum state," in this case, Oregon, and not New Hampshire.

[3] All available case law interpreting this statute suggests that its intent and purpose is to toll New Hampshire's statute of limitations when the defendant is not available to be served by a plaintiff suing in the state of New Hampshire. *Bolduc v. Richards*, 142 A.2d 156, 158 (N.H. 1958) (holding that the statute of limitations is only tolled when a defendant could not otherwise be served in New Hampshire due to lack of personal jurisdiction); *Quarles v. Bickford*, 13 A. 642, 643 (N.H. 1887) (same); *see also Atwood v. Bursch*, 219 A.2d 285, 287 (N.H. 1966) (holding that the statute of limitations runs only in favor of those who are within the state).

[4] Although the analysis in this case is otherwise simple enough to be addressed in an unpublished opinion, we address this issue to hold that, under OR. REV. STAT. §§ 12.430 and 12.440, when parties lawfully adopt a state's law for the purposes of resolving disputes arising from an agreement, they adopt that state's statute of limitations provision and tolling provision *in toto*. Avery agreed to abide by New Hampshire's statute of limitations as well as its tolling provisions, which have consistently been interpreted by New Hampshire courts to apply when defendants are absent from New Hampshire, not from any other state.

Avery's theory rests on the premise that Oregon's choice of law regime converts the foreign jurisdiction's substantive law into Oregon's for the purposes of that lawsuit. That premise is not borne out by the plain language of the Oregon statutes. *See* OR. REV. STAT. § 12.440 (providing "the other state's statutes and other rules of law governing tolling and accrual apply"); OR. REV. STAT. § 81.120 (providing "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen"). Taken together, these provisions simply require Oregon courts to apply the substantive law of another jurisdiction *as a court of the foreign jurisdiction would*, not to transform that foreign substantive law into domestic law for a particular case. Avery's suggested gloss of New Hampshire's tolling statute in light of Oregon's conflict of law regime is wholly unwarranted; it seeks to take advantage of the portions of New Hampshire law that are favorable to Avery and ignore the balance.

Plaintiff contests the constitutionality of the New Hampshire tolling statute's application to her, citing *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), which in turn relied on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). We need not decide whether the New Hampshire tolling statute's application to Avery is unconstitutional because, even if it were, Oregon law provides that Oregon's limitation period applies if the limitation period of another state that otherwise would apply imposes an unfair burden in defending against the claim. OR. REV. STAT. § 12.450. The applicable Oregon statute of limitations for contractual claims is six years, *id.* § 12.080, and the action against Avery was filed within six years.

[5] Because Avery was absent from New Hampshire at all relevant times, the statute of limitations on the claim against her was tolled under New Hampshire law and had not run by the time the Attorneys brought suit against her in Oregon. Even if the New Hampshire tolling statute were unconstitutional, OR. REV. STAT. § 12.450 would replace New Hampshire's statute of limitations with Oregon's six-year limitations period, under which the suit was timely. Accordingly, the district court did not err in granting summary judgment to the Attorneys on the claim that they had violated the FDCPA by attempting to collect on a time-barred debt. The district court was also correct in denying Avery's claim for summary judgment on this issue.[1]

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[1] Because the claim against Avery was not time-barred, we need not and do not decide whether the FDCPA prohibits efforts to collect a timebarred debt.

B. Attorney's Fees

In an action where a federal district court exercises subject matter jurisdiction over a state law claim, so long as state law does not contradict a valid federal statute, " 'state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' " *MRO Commc'ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975)); *see also Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Under Oregon choice-of-law provisions, the state law chosen by the parties to control the substantive issue under dispute also controls the issue of attorney's fees, unless doing so would circumvent a fundamental public policy of Oregon law. *Fiedler v. Bowler*, 843 P.2d 961, 963 (Or. Ct. App. 1992). In this case, however, the district court explicitly declined to exercise subject matter jurisdiction over the state law claim, so it is unclear whether New Hampshire law or federal law controls Avery's entitlement to attorney's fees on the state law counterclaim. *See MRO Commc'ns*, 197 F.3d at 1281 (holding state law controls entitlement to attorney's fees *if* the district court exercises subject matter jurisdiction over a state law claim).

[6] We need not resolve this question, because Avery has not established her entitlement to attorney's fees under either standard. Although the New Hampshire Supreme Court has held a party is entitled to attorney's fees under New Hampshire law when the opposing party recovers nothing on a claim after a jury trial, *see Van Der Stok v. Van Voorhees*, 866 A.2d 972, 978 (N.H. 2005), we have not found any case in which

a New Hampshire court held a party is entitled to attorney's fees when a claim against it is dismissed without prejudice. Under federal law, a prevailing party must have experienced an alteration in the legal relationship of the parties in order to be entitled to attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Avery's legal relationship with First Resolution was not altered by the district court's dismissal without prejudice of the permissive state law counterclaims because First Resolution was free to refile those claims. *See Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 982 (9th Cir. 2008) (holding defendant was not a prevailing party, because defendant "remains at risk that Oscar will re-file his IDEA claim in federal court"); *cf. Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 103 (2d Cir. 2006) (per curiam) (denying the defendant's claim for attorney's fees because "[a] dismissal on the ground of *forum non conveniens* does not, after all, immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims"). Accordingly, the district court did not abuse its discretion in denying Avery's motion for attorney's fees and costs.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case No. CV 06-1812-HA

[Filed August 7, 2007]

ROBIN L. AVERY,	)
Plaintiff,	)
	)
v.	)
	)
FIRST RESOLUTION MANAGEMENT CORPORATION, et al.	)
Defendants.	)
	)

JUDGMENT

Based upon the record,

It is hereby, ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is dismissed with prejudice.

It is, hereby, further ORDERED, ADJUDGED AND DECREED that First Resolution Investment Corporation's counterclaim is dismissed without prejudice.

Dated this 7 day of August, 2007.

/s/ Ancer L. Haggerty

Ancer L. Haggerty
Chief U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 06-1812-HA

[Filed May 25, 2007]

ROBIN AVERY,

Plaintiff,

v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation, et al.

Defendants.

OPINION AND ORDER

HAGGERTY, Chief Judge:

This action arises, in part, out of a prior state court action initiated by defendants First Resolution Management Corp. and First Resolution Investment Corp. (together, First Resolution) and their attorneys, Derrick E. McGavic (McGavic) and Kristin K. Finney (Finney) (together, the Attorney Defendants) (First Resolution and the Attorney Defendants are

collectively referred to as defendants), to collect a credit card debt from plaintiff. That action (hereinafter, the Underlying Lawsuit) was dismissed voluntarily by defendants. Plaintiff later filed this action, claiming that defendants' debt collection practices violated sections 1692e, 1692f, and 1692g of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (FDCPA). Plaintiff seeks actual damages, additional damages from each defendant in the amount of $1,000, as well as attorney fees and costs under the FDCPA. Plaintiff also claims that First Resolution violated section 1681s-2 of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, but that claim is not at issue in the motions addressed in this Opinion and Order.

First Resolution asserts a counterclaim against plaintiff seeking to collect the underlying credit card debt, which remains outstanding. Plaintiff moves to dismiss First Resolution's counterclaim on grounds that (1) it is a permissive counterclaim over which this court lacks subject matter jurisdiction, and (2) the relevant statute of limitations has expired, making the counterclaim untimely.

Additionally, the Attorney Defendants and plaintiff have filed summary judgment motions. The Attorney Defendants move for partial summary judgment on plaintiff's claims to the extent they are based on an alleged attempt to collect a time-barred debt, arguing that the Underlying Lawsuit was timely. Plaintiff opposes the Attorney Defendants' motion and moves for partial summary judgment on the issue of defendants' liability under the FDCPA for attempting to collect a time-barred debt. First Resolution opposes this motion on grounds that the debt was not time-

barred, and alternatively, asserts that genuine issues of fact remain as to FDCPA liability and damages.

The court heard oral argument on May 14, 2007. For the following reasons, the Attorney Defendants' Motion for Partial Summary Judgment [20] is granted, plaintiff's Motion for Partial Summary Judgment [26] is denied, and plaintiff's Motion to Dismiss First Resolution's Counterclaim [15] is granted.

FACTUAL BACKGROUND

In July 2001, plaintiff, who resided in Oregon at all relevant times, received an offer for a credit card from Providian National Bank (Providian). Plaintiff's application was approved and plaintiff received the credit card in the mail. Plaintiff allegedly received a Providian National Bank Visa and Mastercard Account Agreement separately (the Agreement). Plaintiff accepted the terms and conditions in the Agreement by using the credit card and received billing statements at her Oregon residence for an account maintained by Providian (the Account). The last payment was credited to the Account on November 5, 2001. Plaintiff allegedly advised creditors that she was experiencing financial distress in the latter part of 2001.

Plaintiff failed to make the minimum payment due on December 16, 2001, or any payment after that date. Providian assigned the Account for collection shortly after plaintiff missed the minimum payment on December 16, 2001.

The Agreement provides that, on default, interest accrues on the outstanding balance. At the time of

default, the outstanding balance was $2,971.82, plus interest at 23.99 percent per annum. From December 16, 2001, to June 24, 2002, Providian allegedly capitalized $786.63 in charges and interest which were not authorized by the Agreement.

The Agreement contains a choice-of-law provision, stating that New Hampshire law applies regardless of the cardholder's residence. The relevant statute of limitations for an action on a credit card under New Hampshire law is found in N.H. Rev. Stat. Ann. § 508:4, which provides:

> Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Another provision of the Agreement states: "You waive . . . any applicable statute of limitations." Decl. of Robin Avery (First), Ex. 2, ¶ 15.

On November 15, 2004, First Resolution sent plaintiff a "Final Notice" identifying itself as the owner of the debt on the Account, and indicating that the Account would be forwarded to a lawyer in plaintiff's

area if the Account was not resolved within twenty-one days of the date of the letter, December 6, 2004.

Although the parties dispute when the Account was forwarded to defendant McGavic for collection, it is undisputed that plaintiff received a letter from McGavic dated December 29, 2004, more than three years after the December 16, 2001, default on the Account.

On February 9, 2006, McGavic filed the Complaint in the Underlying Lawsuit in the Washington County Circuit Court, Oregon. McGavic declares that prior to filing the Underlying Lawsuit, he determined that the statute of limitations on plaintiff's debt was tolled by her absence from New Hampshire.

On February 9, 2006, plaintiff was served with copies of a summons in the Underlying Lawsuit. That same day, plaintiff disputed and requested verification of the debt referenced in the Complaint. Plaintiff also allegedly requested proof that the statute of limitations had not expired. Defendant Finney declares that she did not learn that there might be an issue involving the statute of limitations until plaintiff's attorney contacted defendants in late September.

On May 2, 2006, defendant Finney represented that the amount due on the Account was $7,514.51; $7,619.61 on June 13, 2006; and $7,762.24 on August 10, 2006.

In July 2006, McGavic caused a copy of the summons and Complaint to be served on plaintiff. On September 13, 2006, McGavic served plaintiff with a

notice of intent to apply for an Order of Default Judgment in the legal action.

On September 20, 2006, Finney received notice that plaintiff was represented by an attorney. The following day, Finney filed a Motion to Dismiss the Underlying Lawsuit without prejudice. Finney declares she decided to dismiss the case because McGavic decided it would be best to avoid protracted litigation over the relatively small amount in dispute, and not because plaintiff's attorney had raised the statute of limitations as a possible defense. Finney further declares that, based on research for a previous case, she believed that the statute of limitations should be tolled under New Hampshire law.

Plaintiff filed this action on December 19, 2006. On January 31, 2007, First Resolution filed a counterclaim seeking to collect the debt allegedly due on the Account (the Counterclaim), which plaintiff now moves to dismiss.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. Assuming that there has been sufficient time for discovery, summary judgment should be entered against a "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

Special rules of construction apply to evaluating summary judgment motions: 1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; 2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party; and 3) the court must assume the truth of direct evidence set forth by the nonmoving party if it conflicts with direct evidence produced by the moving party. *T.W. Elect. Serv. v. Pac. Elect. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). When different ultimate inferences can be reached, summary judgment is not appropriate. *Sankovich v. Life Ins. Co. of N. Am.*, 638 F.2d 136, 140 (9th Cir. 1981).

When both parties file cross-motions for summary judgment, with both parties asserting that there are no uncontested issues of material fact, the court still must determine whether disputed issues of material fact are present, because a summary judgment cannot be granted if a genuine issue as to any material fact exists. *Fair Housing Council of Riverside County, Inc. v. Riverside*, 249 F.3d 1132, 1136 (9th Cir. 2001); *see also Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030,

1037 & n. 5 (9th Cir. 2000) (acknowledging the district court's responsibility to analyze whether the record on cross-motions for summary judgment demonstrates the existence of genuine issues of material fact, even in those cases in which both parties believe that there are no material factual issues). The court must consider each summary judgment motion on its own merits and all appropriate evidentiary material identified and submitted in support of and in opposition to both motions before ruling on each of them. *Fair Housing Council*, 249 F.3d at 1135.

ANALYSIS

A. Motions for Partial Summary Judgment

The Attorney Defendants move for partial summary judgment dismissing plaintiff's FDCPA claims to the extent they are based on an alleged attempt to collect a time-barred debt. They assert that, as a matter of law, the statute of limitations has not expired on the underlying debt. Plaintiff opposes this motion and moves for summary judgment on the same issue, arguing that the underlying debt is time-barred as a matter of law.

At issue initially is determining which statute of limitations applies to the underlying debt. A federal court sitting in diversity must apply the choice of law rules of the forum state to determine which state's law applies. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 661 (9th Cir. 1999). Under Oregon law, "if a claim is substantively based . . . [u]pon the law of one other state, the limitation period of that state applies." O.R.S. 12.430(a).

Because the Agreement is governed by the substantive law of New Hampshire, New Hampshire's three-year statute of limitations applies to the underlying debt. *See* N.H. Rev. Stat. Ann. § 508:4; *see also A&B Lumber Co. v. Vrusho*, 871 A.2d 64, 66 (N.H. 2005) (citations omitted) ("Under New Hampshire law, a contract claim must be brought within three years of the contract's breach").

Plaintiff's last payment was credited to the Account on November 5, 2001. Thus, unless tolled, the statute of limitations for the underlying debt expired on November 5, 2004.

However, the Attorney Defendants argue that New Hampshire's statute of limitations has been tolled by plaintiff's absence from that state. It is true that if New Hampshire's statute of limitations applies to the underlying debt, then that state's tolling rules also apply. *See* O.R.S. 12.440 ("If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply").

Plaintiff concedes that she did not reside in New Hampshire before, during, or after the cause of action accrued for the underlying debt. Pl.'s Mem. Supp. Partial Summ. J. at 15. Under New Hampshire law, "[i]f the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action." N.H. Rev. Stat. Ann.

§ 508:9. Plaintiff points to no basis through which process could have been served on her in New Hampshire. Accordingly, to the extent New Hampshire's three-year statute of limitations applies to the underlying debt, it never ran in favor of plaintiff. *See Gagnon v. Croft Mfg. & Rental Co.*, 235 A.2d 522, 524 (N.H. 1967) (time that a defendant corporation was absent from the state is excluded in computing the time limit for bringing the action); *Atwood v. Bursch*, 219 A.2d 285, 287 (N.H. 1966) (citations omitted) ("The general statute of limitations . . . runs only in favor of those who are within the state."); *Bolduc v. Richards*, 142 A.2d 156, 158 (N.H.1958) (citation and quotations omitted) (tolling the statute of limitations because of the debtor's absence from the state requires that process cannot be served upon the debtor); *Paine v. Drew*, 44 N.H. 306 (N.H.) (1862) ("tolling provision applies to defendants who have never resided in the State, as well as to those who have resided in it and have removed from it").

The Attorney Defendants acknowledge that New Hampshire's tolling provision, which would preclude the statute of limitations from ever running on the underlying debt, may impose an unfair burden on plaintiff. Mem. Supp. Defs.' Mot. for Partial Summ. J. at 4. Accordingly, Oregon's limitation provisions apply:

> If the court determines that the limitation period of another state applicable under ORS 12.430 and 12.440 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against

> the claim, the limitation period of this state applies.

O.R.S. 12.450; *see also Fields v. Legacy Health Sys*, 413 F.3d 943, 954 (9th Cir. 2005) (citation omitted) (describing identical Washington provision as an "'escape clause,' allowing a court to evaluate the disparate effect of a foreign statute of limitations and choose to apply a local limitations period to avoid unfairness").

However, this provision fails to save plaintiff because, as plaintiff conceded at oral argument, under Oregon law her underlying debt is not time-barred and the Underlying Lawsuit was timely. Oregon law provides a six-year statute of limitations for breach of contract claims. *See* O.R.S. 12.090. The cause of action for the underlying debt accrued on the day that plaintiff made her last payment, which was November 5, 2001. *See* O.R.S. 12.450 (cause of action on debt shall be deemed to have accrued from the time of the last charge or payment proved in the account). Accordingly, under Oregon law the statute of limitations on the underlying debt will not expire until November 5, 2007, and the Underlying Lawsuit was timely.

In sum, this court finds as a matter of law that the underlying debt is not time-barred, pursuant to New Hampshire's tolling provisions and, alternatively, the application of Oregon's six-year statute of limitations period. As such, summary judgment is warranted in favor of defendants on plaintiff's FDCPA claims to the extent they depend upon an attempt to collect an allegedly time-barred debt.

B. Plaintiff's Motion to Dismiss Counterclaim of First Resolution

Plaintiff moves to dismiss the Counterclaim on grounds that the underlying debt is time-barred. As discussed above, the underlying debt is not time-barred, pursuant to New Hampshire's tolling provisions and Oregon's six-year limitation period. The Counterclaim is timely.

Plaintiff also moves to dismiss the Counterclaim, pursuant to Federal Rule of Civil Procedure 12(b)(1), on grounds that the court lacks subject matter jurisdiction. Plaintiff argues that the Counterclaim is not compulsory, this court lacks supplemental jurisdiction over it.

1. The Counterclaim is Permissive

First Resolution argues that the Counterclaim is compulsory under the Ninth Circuit's "logical relationship" test. "Compulsory" counterclaims are claims that "arise[ ] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). The Ninth Circuit applies a "logical relationship test" to determine whether a counterclaim is compulsory. Under this test, the court "analyze[s] whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987) (quoting *Harris v. Steinem*, 571 F.2d 119, 123 (2d Cir. 1978)). A defendant failing to bring a compulsory counterclaim is barred from asserting that claim in a future proceeding. Fed. R. Civ. P. 13(a);

Sams v. Beech Aircraft, 625 F.2d 273, 276 n.4 (9th Cir. 1980) (citing *Baker*, 417 U.S. at 469 n.1); *see also Channell*, 89 F.3d at 385. All counterclaims that are not compulsory are "permissive." Permissive counterclaims are claims that do "not aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(b).

The Ninth Circuit has not addressed whether a counterclaim for the underlying debt in an FDCPA action should be regarded as compulsory or permissive. Plaintiff cites three decisions from district courts in this circuit holding that a counterclaim for the underlying debt in an FDCPA action is permissive, *not* compulsory. *See Sparrow*, 385 F. Supp. 2d at 1069 (citations omitted) (concluding that defendant debt collectors' claims were not compulsory and supplemental jurisdiction did not exist on that basis because "[w]hether a plaintiff in an unfair debt collection practices action actually has outstanding debt is irrelevant to the merits of that claim"); *Campos*, 404 F. Supp. 2d at 1168-69 (holding that a dental service provider's breach of contract counterclaim in FDCPA action was permissive, rather than compulsory because issues underlying the two claims were distinct and were required to be supported by different evidence); *Hart v. Clayton-Parker & Assoc.*, 869 F. Supp. 774, 777 (D. Ariz. 1994) ("every published decision directly addressing the issue . . . has found that FDCPA lawsuits and lawsuits arising from the underlying contractual debt are *not* compulsory counterclaims") (emphasis in original).

The court in *Sparrow* reasoned that the issues raised by an FDCPA claim and a counterclaim for the underlying debt are distinct:

> The [FDCPA claim] relates to the application of the FDCPA and focuses on a narrow realm of facts concerning the use of abusive, deceptive and/or unfair debt collection practices by defendants. On the other hand, [the defendant's] counterclaim encompasses a private duty under state law and requires a broad proof of facts establishing the existence and performance of a contract, the validity of the contract's provisions, a breach of the contract by the plaintiff and monetary damages resulting from the breach. The claim and counterclaim are, of course, 'offshoots' of the same basic transaction, but they do not represent the same basic controversy between the parties.

385 F. Supp. 2d at 1068 (quoting *Leatherwood v. Universal Bus. Serv.*, 115 F.R.D. 48, 49 (W.D.N.Y. 1987).

Additionally, each claim requires different evidence to support it. *See Campos*, 404 F. Supp. 2d at 1169. Here, the Counterclaim requires proof of a valid contract and that plaintiff actually has outstanding debt. By contrast, plaintiff's FDCPA claim requires proof of defendants' allegedly abusive collection practices. Whether plaintiff actually has outstanding debt is essentially irrelevant to her FDCPA claims. *See Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (holding that a debtor has standing to complain of violations of the FDCPA, regardless of whether a valid debt exists).

First Resolution cites no authority for the proposition that a claim for the underlying debt in an

FDCPA action should be deemed compulsory, and the court is unpersuaded by First Resolution's attempts to distinguish the decisions that regarded such claims as permissive. First Resolution argues that the type of abusive conduct alleged by plaintiff (*e.g.*, attempting to collect a time-barred debt, as opposed to other abusive practices) sets this case apart because under these circumstances plaintiff's FDCPA claim also turns on whether the underlying debt is time-barred. Because the court finds that summary judgment is warranted on the statute of limitations issue, that distinction no longer applies.

Plaintiff asserted at oral argument that her remaining FDCPA claims involve alleged failures to verify the debt and attempts to collect amounts not authorized by the Agreement. As discussed above, other district courts in the Ninth Circuit have regarded counterclaims for the underlying debt as permissive in such circumstances, based on the different issues and evidence involved. This court views this issue similarly and finds that the Counterclaim is permissive, not compulsory.

2. Supplemental Jurisdiction Under 28 U.S.C. § 1367(a)

Whether supplemental jurisdiction can be exercised over the Counterclaim under Section 1367 is a question of law. Federal courts have original jurisdiction over all civil actions "arising under the Constitution, laws, or treatises of the United States" and in all civil actions where complete diversity of citizenship exists and the amount in controversy exceeds $75,000. 28 U.S.C. §§ 1331, 1332.

Additionally, the applicable statute, 28 U.S.C. § 1367, grants federal courts supplemental jurisdiction over state law counterclaims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Section 1367 applies to state law claims brought by a plaintiff as well as to counterclaims brought by a defendant.

Before Congress enacted the supplemental jurisdiction statute in 1990, the rule was that federal courts had supplemental jurisdiction over compulsory counterclaims because a defendant would otherwise lose the opportunity to be heard on that claim. *Baker v. Gold Seal Liquors*, 417 U.S. 467, 468 n.1 (1974); *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996) ("Refusal to entertain a compulsory counterclaim might lead to its forfeiture"). By contrast, federal courts did not have jurisdiction over permissive counterclaims absent an independent basis for subject matter jurisdiction. *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212-13 (2d Cir. 2004); *Channell*, 89 F.3d at 384; *see also Adams St. Joint Venture v. Harte*, 231 F. Supp. 2d 759, 761-62 (N.D. Ill. 2002).

More recently, many courts have concluded that the "same case or controversy" test established by Section 1367 extends supplemental jurisdiction beyond counterclaims that are compulsory and to encompass some permissive counterclaims. *See, e.g., Sparrow v. Mazda Am. Credit*, 385 F. Supp. 2d 1063, 1067 (E.D. Cal. 2005) (the "same case or controversy test is clearly broader than the 'same transaction or occurrence' test for compulsory counterclaims, but . . . also appears to be broader than the test for permissive

counterclaims"); *Campos v. W. Dental Servs., Inc.*, 404 F. Supp. 2d 1164, 1168 (N.D. Cal. 2005) ("The test for supplemental jurisdiction under Section 1367 appears to be broad enough to encompass some permissive counterclaims"); *see also Channell*, 89 F.3d at 384; *Jones*, 358 F.3d at 212-13.

Section 1367(a) extended supplemental jurisdiction beyond compulsory claims to encompass permissive claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *Campos*, 404 F. Supp. 2d at 1169. Both the Counterclaim and plaintiff's underlying FDCPA claims relate to a single debt incurred by plaintiff. Accordingly, the Counterclaim satisfies the "same case or controversy" test and supplemental jurisdiction could be exercised under Section 1367(a).

3. The Court Declines to Exercise Supplemental Jurisdiction

Even if supplemental jurisdiction exists, the court may decline to exercise supplemental jurisdiction over the Counterclaim if: (1) it raises a novel or complex issue of state law; (2) it substantially predominates over the claim(s) over which the court has original jurisdiction; (3) the court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. *See* 28 U.S.C. § 1367(c).

Other district courts in the Ninth Circuit have declined to exercise supplemental jurisdiction over a counterclaim for the underlying debt in an FDCPA suit, citing "compelling reasons" under Section

1367(c)(4). *See, e.g.*, *Campos*, 404 F. Supp. 2d at 1170-71; *Sparrow*, 385 F. Supp. 2d at 1070-71. These courts reason that allowing a debt collector to bring an action for the underlying debt in a case brought under the FDCPA may deter litigants from pursuing their rights under that statute:

> To allow a debt collector defendant to seek to collect the debt in the federal action to enforce the FDCPA might well have a chilling effect on persons who otherwise might and should bring suits such as this. Moreover, it would involve this Court in questions of no federal significance. Given the remedial nature of the FDCPA and the broad public policy which it serves, federal courts should be loath to become immersed in the debt collection suits of . . . the target of the very legislation under which a FDCPA plaintiff states a cause of action.

Sparrow, 385 F. Supp. 2d at 1071 (quoting *Leatherwood*, 115 F.R.D. at 50 (citations omitted)); *Campos*, 404 F. Supp. 2d at 1170.

First Resolution argues that its timeliness defense to plaintiff's FDCPA claim places the same issues involved in the Counterclaim before the court and that declining jurisdiction would be inefficient and raises the risk of potential inconsistent judgments. These arguments are without merit. As discussed previously, summary judgment is warranted on the timeliness issue. Plaintiff's remaining FDCPA claims are distinct from the Counterclaim, both in terms of the issues presented and the evidence required. The *Campos* court rejected identical arguments when it declined to exercise supplemental jurisdiction over a counterclaim

for the underlying debt in an FDCPA action. 404 F. Supp. 2d at 1170.

A major purpose of the FDCPA is to protect individuals from unfair debt collection practices regardless of whether the individual actually owes a debt. *Baker*, 677 F.2d at 777 (citations omitted) ("The [FDCPA] is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists"). This purpose provides a compelling reason for declining to exercise supplemental jurisdiction here.

As discussed above, summary judgment is warranted on plaintiff's FDCPA claims to the extent they depend on an alleged attempt to collect a time-barred debt. The remaining FDCPA claims involve alleged failures to verify and attempts to collect amounts not authorized by the Agreement. Plaintiff's liability under the Agreement is irrelevant to these issues. Allowing the Counterclaim here could lead to extensive litigation of individualized contract liability and damage issues that bear little relation to plaintiff's FDCPA claims. Thus, there is a possibility that the Counterclaim would substantially predominate over plaintiff's original FDCPA claims. Accordingly, the court declines to exercise jurisdiction based on Section 1367(c)(2).

In sum, the court finds that the Counterclaim is a permissive counterclaim over which the court could exercise supplemental jurisdiction under Section 1367(a). However, the court declines to exercise supplemental jurisdiction over the Counterclaim, pursuant to Section 1367(c), because of the public policy underlying the FDCPA and because the

Counterclaim may substantially predominate over plaintiff's FDCPA claims.

CONCLUSION

For the foregoing reasons, defendants' Motion for Partial Summary Judgment [20] is GRANTED, plaintiff's Motion for Partial Summary Judgment [26] is DENIED, and plaintiff's Motion to Dismiss Counterclaim [15] is GRANTED.

IT IS SO ORDERED.

DATED this 25 day of May, 2007.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cv-160-T-27EAJ

[Filed February 21, 2008]

GWEN MCCORRISTON	)
	)
Plaintiff,	)
	)
vs.	)
	)
L.W.T., INC., et al.,	)
	)
Defendants.	)
	)

ORDER

BEFORE THE COURT is Defendants' Motion to Dismiss Second Amended Complaint, or, Alternatively, Motion for Summary Judgment (Dkt. 46), to which Plaintiff has responded in opposition (Dkt. 49).[1]

[1] After Defendants filed the instant motion for summary judgment, the parties stipulated to an extension of case management deadlines. (Dkts. 50, 51). Although discovery is ongoing, Plaintiff has not requested a stay of the instant motion pending completion of discovery.

Plaintiff asserts claims against Defendants for unlawful debt collection practices under the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692, *et seq.*, (Count I), and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. §§ 559.55 *et seq.*, (Count II), based on Defendants' efforts to collect on a time-barred debt. Upon consideration, Defendants' motion is GRANTED IN PART and DENIED PART.

Background

On November 1, 1996, Plaintiff opened a Chase Manhattan Bank Visa credit card account ("the account"). (Dkt. 42, ¶ 9). The account agreement contained a Delaware choice of law clause. (Law Firm Aff. ¶ 7). When Plaintiff failed to make one or more payments, the account was closed by the credit card issuer on or about November 22, 2002. (Dkt. 42, ¶ 9). The account was assigned to Defendant L.W.T., Inc. ("LWT"). (LWT Aff. ¶ 10). On January 12, 2006, Defendant Shafritz, on behalf of Defendant Shafritz & Braten, P.A. ("the Law Firm"), sent a letter to Plaintiff with the statutorily-required notice that the account had been assigned to LWT. (Dkt. 42, ¶ 11, Exh. A). Shafritz stated that the Law Firm had been retained to collect the sum of $11,376.24 and offered to settle the account for $9,100.99. (Dkt. 42, Exh. A). Shafritz further stated: "To accept this offer remit a check made payable to 'Shafritz and Braten, P.A.' by January 30, 2006. Time is of the essence. Prompt payment is necessary to forestall further review of your file by this office." (*Id.*) The letter closed with statutorily-required language alerting Plaintiff to her rights to dispute and verify the alleged debt. (*Id.*) Plaintiff does not contend that she responded to the letter.

On April 5, 2006, LWT, acting through the Law Firm, filed suit against Plaintiff in the County Court in and for Hillsborough County to collect the amount allegedly due. (Dkt. 42, ¶ 12). That state court action was dismissed with prejudice on October 13, 2006 as time-barred under Delaware's three year statute of limitations for actions between debtors and creditors. (Dkt. 42, Exh. B). Defendant Braten, another attorney at the Law Firm, avers that his first "direct involvement" with the state court action came after the dismissal, and that he previously researched the statute of limitations issues. (Dkt. 40-2; Braten Aff. ¶ 4; Dkt. 44-2: Law Firm Aff. ¶¶ 5-7). On November 19, 2007, the Circuit Court for Hillsborough County, Appellate Division, affirmed the dismissal of the state court action. (Dkt. 49-2).

On January 25, 2007, Plaintiff filed this federal action, claiming: (1) Defendants violated the FDCPA by filing a time-barred lawsuit and because LWT was not registered as a "consumer collection agency," as required by Florida law (Count I); and (2) Defendants violated the FCCPA by sending the January 12, 2006 letter even though suit on the debt was time-barred (Count II). In the instant motion to dismiss, Defendants argue that Plaintiff's FDCPA claim is subject to dismissal pursuant to the FDCPA's one year statute of limitations. Alternatively, Defendants argue that summary judgment should be granted on Plaintiff's FDCPA claim because Defendants did not seek to collect on a "debt" within the meaning of the FDCPA, the state court action was actually timely under both Florida and Delaware law, Defendants are protected by the FDCPA's "bona fide error" affirmative defense, and LWT, as holder of the debt, is not required to register as a consumer collection agency.

Defendants argue that summary judgment should be granted on Plaintiff's FCCPA claim because Defendants did not knowingly file a time-barred lawsuit, as required for a FCCPA claim, and because Defendants are protected by Florida's litigation privilege, as the January 12, 2006 letter was a required pre-suit communication. Upon consideration, Defendants' motion to dismiss is denied, and Defendants' motion for summary judgment is granted in part and denied in part.

I. Motion to Dismiss

A. Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1964 (2007)(quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). Although a complaint need not include detailed factual allegations, it must contain sufficient factual allegations, which, when taken as true, "raise a right to relief above the speculative level." *Id.* at 1964-65. A complaint may be dismissed on the basis of a statute of limitations "only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute." *Tello v. Dean Witter Reynolds, Inc.,* 410 F.3d 1275, 1288 n.13 (11th Cir. 2005) (internal quotations omitted).

B. Discussion

An action to enforce liability under the FDCPA must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Defendants first argue that to the extent Plaintiff's FDCPA claim is premised on the mailing of Shafritz' January 12, 2006 letter, Plaintiff's claim is barred by the one-year statute of limitations, which Plaintiff concedes. (Dkt. 49 at 4); *see also Maloy v. Phillips,* 64 F.3d 607, 608 (11th Cir. 1995) (FDCPA claim accrues the day after a collection letter is mailed). Plaintiff instead maintains that Count I is premised on the filing of the state court action on April 5, 2006 and LWT's failure to register pursuant to Fla. Stat. § 559.553, both of which were within the statute of limitations. Defendants contend that the filing of the state court action was part of a "continuing violation," which originated with the first communication on January 12, 2006. Thus, Defendants claim that because the January 12, 2006 letter was outside the statute of limitations, any suit on one of Defendants' related acts is also time-barred.

The cases cited by Defendant in support of their contention are distinguishable, as even the latest alleged violations in those cases occurred outside the limitations period. For instance, in *Sierra v. Foster & Garbus,* the last alleged illegal action was in June 1997 and the lawsuit was filed November 13, 1998, well outside the statute of limitations. *Sierra v. Foster & Garbus,* 48 F. Supp. 2d 393, 395 (S.D.N.Y. 1999); *see also Wilhelm v. Credico, Inc.,* 455 F. Supp. 2d 1006, 1007 (D.N.D. 2006) (challenged communication was sent on December 10, 2003 and defendant was not added as party until October 3, 2005); *Fraenkel v.*

Messerli & Kramer, PA., No. 04-1072, 2004 WL 1765309, at *3 (D. Minn. July 29, 2004) (letter that formed basis for claim was sent on December 3, 2002 and lawsuit filed February 29, 2004); *Kirscher v. Messerli & Kramer, P.A.*, No. 05-1901, 2006 WL 145162, at *5 (D. Minn. Jan, 18, 2006) (where alleged violation was premised on request for attorney's fees, claim accrued when debt collector first demanded fees, not when it filed affidavits in support); *Calka v. Kucker, Kraus & Bruh, LLP*, No. 98-cv-0990, 1998 WL 437151, at *3 (S.D.N.Y. Aug. 3, 1998) (last violation was filing of state lawsuit on July 16, 1996 and federal lawsuit was filed on February 11, 1998).

In this case, the filing of the state court action on April 5, 2006 was well within the one year limitations period. That Defendants sent a dunning letter outside the limitations period does not render Plaintiff's FDCPA claim time-barred, where, as here, Plaintiff has alleged a discrete violation within the limitations period. *See Kaplan v. Assetcare, Inc.*, 88 F. Supp. 2d 1355, 1360 (allowing claim based on dunning letters within statute of limitations period, although some were outside); *Pittman v. J.J. MacIntyre Co. of Nev., Inc.*, 969 F. Supp. 609, 611 (D. Nev. 1997) (same). Based on the foregoing, Defendants' motion to dismiss Count I as time-barred is denied.

II. Motion for Summary Judgment

A. Standard

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24. Plaintiff's evidence must be significantly probative to support the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The Court will not weigh the evidence or make findings of fact. *Anderson*, 477 U.S. at 249; *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party. *Id.*

B. Discussion

1. FDCPA (Count I)

In Count I, Plaintiff alleges that Defendants violated the FDCPA by filing a time-barred state court action and because LWT was not registered as a consumer collection agency, as required by Florida law. In order to prevail on an FDCPA claim, Plaintiff must prove that: (1) she was the object of collection activity arising from consumer debt; (2) Defendants are debt collectors as defined by the FDCPA; and (3) Defendants have engaged in an act or omission prohibited by the FDCPA. *Fuller v. Becker & Poliakoff P.A.*, 192 F. Supp. 2d 1361, 1366 (M.D. Fla. 2002) (quoting *Kaplan*, 88 F. Supp. 2d at 1360-61). Defendants do not dispute that Plaintiff was the subject of a collection activity, that the filing of a time-barred lawsuit is prohibited by the FDCPA, and that LWT was not registered as a "consumer collection agency."[2] Defendants instead argue that summary judgment should be granted on Plaintiff's FDCPA claim because: (1) Defendants did not collect on a

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[2] This Court previously dismissed Plaintiff's FDCPA claim pursuant to 15 U.S.C. § 1692e(5) because the filing of a time-barred lawsuit does not constitute a "threat" with the meaning of § 1692e(5). (Dkt. 18 at 2-3). The Second Amended Complaint alleges that the filing of the state court action violated § 1692e, § 1692e(2)(A), § 1692e(5), § 1692e(10), § 1692f, and § 1692f(1), which Defendant does not challenge in the instant motion. *See also Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487-89 (filing of a clearly time-barred lawsuit is illegal pursuant to § 1692f, § 1692e(2)(A), and § 1692e(10)).

consumer "debt," as defined by the FDCPA;[4] (2) the filing of the state court action was timely under both Florida and Delaware law, or, alternatively, Defendants are protected by the "bona ride error defense" because they did not intentionally file a time-barred lawsuit; (3) and LWT was not required by Florida law to register as a consumer collection agency.

a. Existence of a consumer "debt"

Defendants' first argument fails. The FDCPA defines "debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily *for personal, family, or household purposes*." 15 U.S.C. § 1692a(5) (emphasis added). Defendants argue that Plaintiff does not recall the items for which she used her account. Plaintiff testified, however, that although she did not specifically recall what the account was used for, "I would imagine household, you know, expenses, living expenses." (Pl. Dep. at 25). As Defendants have not otherwise rebutted this evidence, Plaintiff has pointed to sufficient record evidence that a consumer "debt" existed, for the purposes of summary judgment.

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[4] Defendants also argue that the January 12, 2006 letter did not contain a "threat" within the meaning of the FDCPA. As set forth above, however, Plaintiff's FDCPA claim is not premised on this communication

b. Filing time-barred state court action

As to Defendants' second argument, it is not relevant whether the state court action was *actually* time-barred. A party who brings and loses a debt collection lawsuit is not automatically liable under the FDCPA. *Heintz v. Jenkins,* 514 U.S. 291, 295-96 (1995). Rather, the relevant question is whether Defendants may claim the "bona fide error" defense in 15 U.S.C. § 1692k(c), which provides:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. 15 U.S.C. § 1692k(c).

As set forth in the statute, it is Defendant's burden to prove this affirmative defense by a preponderance of the evidence. *Johnson v. Riddle,* 443 F.3d 723, 727 (10th Cir. 2006). From the undisputed facts of record, the Court finds that Defendants have sustained their burden.

Plaintiff argues that: (1) the bona fide error defense applies almost exclusively to clerical errors, not mistakes of law, as alleged here; and (2) Defendants' intent is a disputed issue of fact, not appropriate for resolution on summary judgment. As to the first argument, there is a split in authority as to whether the bona fide error defense applies to mistakes of law. In the absence of controlling authority in the Eleventh Circuit, this Court finds persuasive the reasoning of

the Tenth Circuit Court of Appeals and Seventh Circuit Court of Appeals, which have joined a growing number of courts finding that the provisions of 15 U.S.C. § 1692k(c) are not limited to clerical mistakes. *See Johnson,* 443 F.3d at 727; *Nielsen v. Dickerson,* 307 F.3d 623, 640-41 (7th Cir. 2002).[4] Accordingly, the pertinent issues in assessing the application of the bona fide error defense are whether Defendants' error was bona fide and unintentional and whether Defendants had procedures in place reasonably adapted to avoid the error. *Johnson,* 443 F.3d at 729; 15 U.S.C. § 1692k(c).

In this case, these elements are closely intertwined. *Id.* at 729 ("Where, as here, the case involves a mistake of law, whether the debt collector's mistake was bona fide will often turn on the debt collector's due diligence practices.") The Law Firm, through Braten, has provided an affidavit averring that Braten

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[4] The court in *Johnson* noted that the cases reaching a contrary conclusion are traceable to the Ninth Circuit Court of Appeal's holding in *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982), which analogized the FDCPA's bona fide error provision to the bona fide error provision found in the Truth in Lending Act (TILA). TILA expressly provides: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors, *except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.*" 15 U.S.C. § 1640(c) (emphasis added). The FDCPA does not contain this limitation. Accordingly, this Court finds, pursuant to the plain language of the FDCPA and Congress's intent, as manifested by the exclusion of TILA's limiting language, that the bona fide error defense applies to mistakes of law, as well as to clerical mistakes. *See also Heintz*, 514 U.S. at 296 (assuming that bona fide error defense would be available for unsuccessful litigation activities).

researched the applicable statutes of limitation under both Florida and Delaware law, which yielded a sufficiently sound legal basis for arguing that: (1) Florida law governed the statute of limitations question (and it is undisputed that if Florida law did apply, the state court action was timely); and (2) if Delaware law applied, the three-year statute of limitations was tolled.

Defendants' contention that Florida law applies is weak, at best, but cannot be said to preclude application of the good faith defense to a FDCPA action. The account agreement contained a Delaware choice of law provision. Contractual choice of law provisions are presumptively valid unless the party opposing the application of the chosen law demonstrates that "the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc. v. E.I. DuPont DeNemours and Co.*, 761 So. 2d 306, 311 (Fla. 2000). Absent an argument by Defendants that Delaware law contravenes strong public policy of Florida, Delaware law applies to substantive matters, including the statute of limitations. *Id.; see also Siegel v. Novak*, 920 So. 2d 89, 93-94 (Fla. 4th DCA 2006); *Prestige Rent-A-Car, Inc. v. Advantage Car Rental and Sales, Inc. (ACRS)*, 656 So. 2d 541, 544 n.2 (Fla. 5th DCA 1995). Defendants have made no such public policy argument. Accordingly, Delaware's statute of limitations applies.

Notwithstanding, Defendants' argument that Florida's statute of limitations applied cannot be said to be without arguable support, as evidenced by the cases researched and cited in the Law Firm's affidavit.

(Law Firm Aff., ¶ 6).[5] Having an arguable good faith, albeit wrong, basis for arguing that Florida's statute of limitations applies, based on a line of Florida cases stating that statutes of limitations are considered procedural, rather than substantive, precludes the requisite finding of bad faith or intentional conduct under the FDCPA.

It is undisputed that in Delaware, a three year statute of limitations for collection suits applies:

> No action . . . based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title. Del. Code Ann. tit. 10, § 8106.

The state court action, filed on April 5, 2006, was brought more than three years after Plaintiff's account was closed on November 22, 2002, which is the last date on which the account could have been in default. As a result, the state court action was untimely under § 8116. Nonetheless, Defendants argue that the tolling provisions of § 8117 apply:

> If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the

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[5] Circuit Judge Crenshaw, sitting in an appellate capacity, was eminently correct in her analysis and conclusion that the Delaware statute of limitations applied. (Dkt. 49-2).

> time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. Del. Code Ann. tit. 10, § 8117.

The Supreme Court of Delaware has correctly observed that the blanket application of the tolling statute to cases involving non-resident defendants, as Defendants urge here, "would result in the abolition of the defense of statutes of limitation in actions involving non-residents." *Hurwitch v. Adams,* 155 A.2d 591, 594 (Del. 1959). In *Hurwitch,* the court found that the tolling statute did not apply where substitute service was available to subject the non-resident defendant to personal jurisdiction in a Delaware court. *Id.* at 593. By contrast, Defendants argue that the Delaware Supreme Court recently applied § 8117 to toll the statute of limitations for several years against a non-resident defendant corporation until it entered Delaware and filed a lawsuit. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co., Inc.,* 866 A.2d 1, 18 (Del. 2005). That court noted that the plaintiff would not have been able to obtain personal jurisdiction over the foreign defendant in Delaware until it was present in the state and subject to service of process. *Id.*

The holdings of *Hurwitch* and *Saudi Basic* are entirely consistent. When a non-resident defendant is

subject to service in Delaware, either through personal or substitute service, the statute of limitations is not tolled. When a non-resident defendant is sued in Delaware, but is outside its jurisdiction, the statute of limitations is tolled until the defendant is available to be served in Delaware. However, one key factor distinguishes these cases from the instant case. In both cases, the courts evaluated the effect of the tolling statute on cases brought in Delaware. The holdings were premised on plaintiff's ability (or inability) to obtain personal jurisdiction over the non-resident defendant in Delaware. No such jurisdictional problem was present in Defendants' state court action. Plaintiff resided in Florida and was subject to personal jurisdiction in Florida.

For the purposes of determining Defendants' good faith, the Court notes that § 8117 is not expressly limited to cases filed in Delaware. Notwithstanding, § 8117 references "the State," an obvious reference to Delaware. Defendants' proposed application of § 8117 to a case filed in Florida is plainly problematic. Defendant's construction of § 8117 would indefinitely toll lawsuits filed in states other than Delaware, notwithstanding that those lawsuits were filed against account holders who were never in Delaware, but who are subject to service in the state in which the suit was filed. Such a construction would, as the court in *Hurwitch* noted, effectively "result in the abolition of the defense of statutes of limitation in actions involving non-residents," an absurd result.

Defendants' strained construction of § 8117 would inject an inherent ambiguity into the statute, an illogical and unreasonable result. Moreover, the cases cited by Defendants do not support such a

construction. Simply put, Defendants are wrong about Florida's statute of limitations applying and wrong about the statute being tolled because McCorriston was not in Delaware. Notwithstanding, Defendants' bona fide error defense based on their mistake of law turns not on whether Defendants were wrong or made every conceivable attempt to ensure that their suit was timely but on whether Defendants had procedures "reasonably adapted to preventing their legal error.[6] 15 U.S.C. § 1692k(c).

This Court agrees with the Circuit Court in and for Hillsborough County that the application of § 8117 to these facts is a "challenging issue." (Dkt. 49-2). The parties have cited no controlling authority on the issue. Further, it is not alleged that this question had been decided adversely to Defendants, or to any other debt collector, in any court, when the state court action was filed.[7] *See Simmons v. Miller,* 970 F. Supp. 661,

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[6] In *Johnson v. Riddle,* the Tenth Circuit Court of Appeals determined that there was an issue of fact as to an attorney's good faith where the attorney failed to complete an *Erie* analysis as to the likely holding of the Utah Supreme Court on whether the debt collector could collect certain penalties. *Johnson,* 433 F.3d at 730. However, the court also noted that if the attorney had undertaken the analysis, he would have come to the "unmistakably clear" and "unambiguous" conclusion that the Utah Supreme Court would not allow the debt collector to collect the challenged penalties. *Id.* at n. 4. No such clear and unambiguous conclusion is dictated in this case.

[7] After the dismissal of the state court action, a Broward County court rejected Defendants' tolling argument pursuant to § 8117, and dismissed the case with prejudice. *L.W.T. v. Brodsky,* No. 06-6852-COWE, 2006 WL 3617983, at *1-2 (Fla. 17th Cir. Ct. Dec. 8, 2006).

666 (S.D. Ind. 1997) (finding that the filing of an untimely lawsuit was not intentional, in part, because there was no controlling legal authority on the question); *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361, 1367 (M.D. Ga. 2007) (same).[8] Defendants have averred that they conducted research before reaching the conclusion that the case was not time-barred. Plaintiff has not disputed this. Although Defendants' argument regarding tolling is unconvincing, if not plain wrong, the record supports their good faith defense since there is an arguable basis for tolling under Delaware law pursuant to the plain language of § 8117, which does not limit its reach to cases initiated in Delaware.

Parties and their counsel must be free to make novel legal arguments, including arguments which turn out to be without merit in areas of unsettled law, so long as there is a good faith basis for doing so. The ultimate rejection of Defendants' argument by the state court action does not mandate a finding, under these circumstances, that Defendants intentionally filed a time-barred suit. *See Heintz,* 514 U.S. at 296 ("we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an 'action that cannot legally be taken.'"); *cf. Kimber,* 668 F. Supp. at 1487-88 (finding state suit violated § 1692f where there was "no question" the claim was time-barred and defendants made no

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[8] The Court notes that neither case applies a bona fide error analysis. Rather, the discussion in both cases includes the element of intent as part of a plaintiff's prima facie case. This approach has been disapproved, as the FDCPA is a strict liability statute. *Turner v. J.V.D.B. & Assoc., Inc.*, 330 F.3d 991, 997 (7th Cir. 2003); *Kaplan*, 88 F. Supp. 2d at 1361.

inquiry into whether a tolling provision was applicable).

Under the facts of this case, Defendants have demonstrated by a preponderance of the evidence that they acted in bona fide error and did not intentionally file a suit which was time barred. After researching the issue, Braten reasonably believed that Florida's statute of limitation applied to the underlying debt when the state court action was filed and alternatively, if Delaware's statute applied, that the limitation period had been tolled. (Law Firm Aff., ¶¶ 5, 6, 7). Although wrong, this was a good faith mistake in their interpretation of an unsettled question of law. Defendants' motion for summary judgment is therefore granted on Plaintiff's FDCPA claim to the extent it is premised on the filing of a time-barred action (Count I).

c. Failing to register pursuant to Fla. Stat. § 559.553

Plaintiff also alleges in Count I that Defendants violated the FDCPA by attempting to collect a consumer debt when LWT had not registered with the Florida Office of Financial Regulation as required by state law. (Dkt. 42, ¶ 14).[9] Defendants' only argument

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[9] Consistent with the allegations in the Second Amended Complaint, Defendants have construed this portion of Plaintiff's claim to relate only to Defendant LWT. (Dkt. 46 at 22-23). In a previous motion to dismiss, which was denied as moot due to the filing of the Second Amended Complaint, Defendants argued that Plaintiff could not state an FDCPA claim based on this violation of state law, standing alone. (Dkt. 25 at 14-15). Defendants have not renewed this argument in the instant motion.

in response is that LWT, as assignee of the account, was not required to register.

Section 559.553(1) provides: "no person shall engage in business in this state as a consumer collection agency or continue to do business in this state as a consumer collection agency without first registering in accordance with this part, and thereafter maintaining a valid registration." A "consumer collection agency" is defined as "any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of collecting consumer debts, which debt collector or business is not expressly exempted as set forth in s. 559.553(4)." Fla. Stat. § 559.55(7).[10]

Defendants argue that LWT was not required to register with the Office of Financial Regulation, as it was not a "consumer collection agency" within the meaning of the statute. Defendants point out that the Second Amended Complaint alleges that LWT was the assignee of the debt. (Dkt. 42, ¶ 10). Defendants maintain that LWT is merely the owner of the debt, not the collector of the debt. Defendant argues that as the "real party in interest," it was not required to register.

Assuming, without deciding, that an assignee of a stale debt, as the "real party in interest" is not subject to the registration requirements of § 559.553(1),

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[10] Plaintiff's reliance on the definition of a "debt collector" in 15 U.S.C. § 1692a(6) is inapposite for purposes of Defendants' argument, as Plaintiff's claim is premised on LWT's failure to register "as required by § 559.553(1), Fla. Stat." (Dkt. 42, ¶ 14).

Defendants' argument does not address an aspect of § 559.553(1) which may bring LWT within the reach of the registration requirement, notwithstanding its status as owner of the debt. The statute applies to any entity in the business "of soliciting consumer debts for collection." Fla. Stat. § 559.55(7).[11] In its affidavit, LWT avers that it "is a Florida corporation that purchases portfolios of charged off credit card accounts and other types of loans." (LWT Aff., ¶ 2). An inference can be reasonably drawn from this affidavit that LWT is in the business of "soliciting consumer debts for collection."

Notwithstanding, the arguments on this issue are not fully developed by the parties. Defendant LWT has therefore not met its burden at the summary judgment stage to refute the elements of Plaintiff's claim. Defendants' motion for summary judgment is accordingly denied as to Plaintiff's claim in Count I that LWT's failure to register with the Office of Financial Regulation constitutes a violation of the FDCPA.

2. FCCPA (Count II)

In Count II, Plaintiff alleges that Defendants violated the FCCPA by sending the January 12, 2006 dunning letter, seeking to collect a time-barred debt. In pertinent part, the FCCPA makes it a violation for a debt collector to: "Claim, attempt, or threaten to

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[11] "Consumer collection agency" means any debt collector or business entity engaged in the business of soliciting consumer debts for collection or of collecting consumer debts, which debt collector or business is not expressly exempted as set forth in s. 559.553(4)." Fla. Stat. § 559.55(7).

enforce a debt when such person *knows* that the debt is not legitimate or assert the existence of some other legal right when such person *knows* that the right does not exist." Fla. Stat. § 559.72(9) (emphasis added). In the instant motion, Defendants contend that they did not "know" that the debt was not legitimate and that they have complete immunity under Florida's litigation privilege because the letter was a condition precedent to filing suit. This Court agrees with Defendants' first argument and therefore need not assess the application of the litigation privilege to the dunning letter.

In contrast to the FDCPA, Plaintiff must prove, as part of the prima facie case alleging a violation of the FCCPA, that Defendants had *actual knowledge* that their claim of a right to enforce the debt was time-barred. *Cole v. Lobello Painting, Inc.*, No. 06-cv-2171, 2007 WL 2330860, at *4 (M.D. Fla. Aug. 14, 2007) (quoting *In re Cooper*, 253 B.R. 286, 290 (Bkrtcy. N.D. Fla. 2000)); *Kaplan*, 88 F. Supp. 2d at 1363 (S.D. Fla. 2000) (noting that FCCPA requires an allegation of knowledge of intent). Constructive knowledge is not sufficient. *Williams v. Streeps Music Co., Inc.*, 333 So. 2d 65, 67 (Fla. 4th DCA 1976) (striking allegation that debt collector "should have known" the claim was not legitimate).

Plaintiff has not established that Defendants had actual knowledge that LWT's claim was time-barred when they sent the January 12, 2006 letter. Nor has Plaintiff raised a genuine issue of fact as to Defendants' actual knowledge. As discussed, Defendants had a good faith basis for arguing that Florida's statute of limitations applied and alternatively that the Delaware statute of limitations

was subject to tolling pursuant to § 8117. Accordingly, based on the undisputed facts of record, Defendants did not have the requisite actual knowledge that their claim was time-barred so as to subject them to liability under Fla. Stat. § 559.72(9).

Based on the foregoing, Defendant's motion for summary judgment is granted on Plaintiff's FCCPA claim (Count II).

Conclusion

Upon consideration, it is **ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss Second Amended Complaint, or, Alternatively, Motion for Summary Judgment (Dkt. 46) is **GRANTED IN PART** and **DENIED IN PART** as to Count I, and **GRANTED** as to Count II, as discussed.

DONE AND ORDERED in chambers this 21st day of February, 2008.

/s/
JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record